Supreme Court, U.S.
FILED
DEC 19 2003

No. 03 903

In The
# Supreme Court of the United States

LANTZ WELCH and LANTZ WELCH, P.C.,

*Petitioners,*

vs.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Missouri Court Of Appeals – Western District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a court disregard a parties' right to arbitrate a dispute under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* by claiming that the denial of that right is "harmless error?"

## PARTIES

The caption of this case contains the names of all parties.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Lantz Welch, P.C. states that it has no parent or subsidiary companies.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Lantz Welch and Lantz Welch, P.C. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals for the Western District entered in this proceeding on June 10, 2003.

## OPINIONS BELOW

The opinion of the Missouri Court of Appeals for the Western District that gives rise to this petition is reported at 114 S.W.3d 285, and is reprinted in the Appendix at App. 1-13. The Missouri Court of Appeals' order denying rehearing and rehearing en banc or transfer to the Missouri Supreme Court (App. 29) is unreported. The Missouri Supreme Court's order denying transfer from the Missouri Court of Appeals (App. 30) is also unreported.

## JURISDICTION

The judgment of the Missouri Court of Appeals sought to be reviewed was entered on March 10, 2003. Petitioner timely filed a Motion for Rehearing and Rehearing en banc and an Alternative Application for Transfer to the Missouri Supreme Court on June 25, 2003, which were denied on July 29, 2003. App. 29. Petitioner then timely filed an Application for Transfer in the Missouri Supreme Court on August 12, 2003, which was denied on September 30, 2003. App. 30. This Court has jurisdiction under 28 U.S.C. § 1257.

## STATUTORY PROVISIONS INVOLVED

The relevant provision of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> § 2. Validity, irrevocability and enforcement of agreements to arbitrate
>
> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

## STATEMENT OF THE CASE

Petitioner Lantz Welch has practiced law in Kansas City, Missouri for over 40 years. For many of those 40 years, Welch's active trial practice was operated through his professional corporation, Petitioner Lantz Welch, P.C. To assist with his representation of Lantz Welch, P.C. clients, Welch associated with four other lawyers. Those lawyers – Respondents Timothy L. Brake, Grant Davis, Scott Bethune and Thomas Jones – all joined Lantz Welch, P.C. over the course of the 1980's and 1990's.

Instead of producing their own business, Brake, Davis, Bethune and Jones worked on Lantz Welch, P.C. cases. Welch financed the law practice in its entirety and advanced the funds for the firm's contingent-fee litigation.

The entirety of the risk of the firm's contingent-fee practice therefore fell on Welch.

After operating under this arrangement for many years, Welch received a letter in December 2000 informing him that Brake, Davis, Bethune and Jones were leaving Lantz Welch, P.C. Brake, who wrote the letter, stated that he was taking all Lantz Welch, P.C. cases with him. In doing so, Brake relied on a 1992 written contract that governed the association between Welch and Brake.

Although Brake claims to have "withdrawn" all the cases under the contract, every single one of the former clients of Lantz Welch, P.C. are clients of Davis, Bethune and Jones through their limited liability company, Respondent Davis, Bethune & Jones, L.L.C. Brake has never had a contract for representation with any of the clients at issue. Brake is instead associated with Davis, Bethune & Jones, L.L.C. as "of counsel," and he continues to work on the cases based on that association alone.

After leaving Lantz Welch, P.C., Brake, Davis, Bethune and Jones all maintained that Welch was not entitled to any part of the fees that the appropriated cases would generate.[1] When efforts at an immediate arbitration failed after Davis, Bethune and Jones refused to participate, Welch filed this lawsuit in Missouri state court to

[1] The decision not to compensate Welch in any form included the approximately $12 million in attorneys' fees that were collected on just one of the cases involved in the dispute. There are over 50 other cases at issue, which places over $50 million in attorneys' fees at stake.

compel arbitration.[2] Welch moved to compel Brake to arbitrate based on the arbitration clause in their 1992 contract. Welch sought to include Davis, Bethune and Jones and their limited liability company based on their alleged status as non-signatory agents of Brake or third-party beneficiaries under the contract. Welch also asserted an alternative quantum meruit claim against Davis, Bethune and Jones to recover the fees at issue.

After Welch filed this action, Brake filed his own application to compel an arbitration between just Brake and Welch. The trial court granted Brake's application to compel arbitration and denied Welch's application, concluding that Davis, Bethune and Jones and their limited liability company were not required to arbitrate. App. 14-21.

Welch immediately appealed the trial court's arbitration ruling to the Missouri Court of Appeals. While that appeal was pending, the arbitration between Welch and Brake took place. Although disclaiming any role as proper parties to the arbitration, Davis, Bethune and Jones provided extensive testimony at the arbitration in favor of Brake. The arbitration panel ruled in favor of Brake, finding that he was entitled to withdraw the Lantz Welch, P.C. cases.

After the arbitration, Brake filed an application with the trial court to confirm the award. Davis, Bethune and Jones simultaneously filed a motion for summary judgment on Welch's quantum meruit claim against them,

---

[2] Welch's application for arbitration relied on both the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and the Missouri Arbitration Act, R.S. Mo. § 435.350 *et seq.* App. 31-48.

contending that Welch was no longer a real party in interest to the claim and principles of res judicata barred the claim. The trial court confirmed the arbitration award. App. 22-24. The trial court also entered summary judgment on the quantum meruit claim based on the apparent view that the arbitration award in favor of Brake extinguished the claim. App. 25-28.[3]

Welch then filed a separate appeal challenging the trial court's confirmation of the arbitration award and summary judgment ruling. After consolidating the two appeals, the Missouri Court of Appeals, in a per curiam opinion, affirmed the trial court. App. 1-13. In first raising the federal question sought to be reviewed, the court of appeals held that even if Welch's argument was correct that the trial court should have compelled Davis, Bethune and Jones to arbitrate, the error was harmless. App. 5-6. The court of appeals reasoned that Welch suffered no apparent prejudice from the failure to compel Davis, Bethune and Jones to arbitrate and that "[e]rror without prejudice [was] not reversible error." App. 5-6. The court of appeals also upheld the trial court's confirmation of the arbitration award in favor of Brake. App. 6-10. Finally, reasoning that Welch was no longer a real party in interest to his quantum meruit claim, the court of appeals affirmed the trial court's entry of summary judgment on that claim. App. 10-13.

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[3] As a result of the trial court's ruling, Welch has never had an opportunity to present the merits of his position before any tribunal. And the defendants who actually withdrew, and are in possession of, the former Lantz Welch, P.C. cases – Davis, Bethune and Jones – have effectively avoided consideration of the merits of their position.

In response to the court of appeals' decision, Welch filed a Motion for Rehearing and Rehearing En Banc and an Alternative Application for Transfer to the Missouri Supreme Court. App. 49-76. The court of appeals denied both the Motion for Rehearing and Rehearing En Banc and the Alternative Application for Transfer on July 29, 2003. App. 29. Welch then sought review in the Missouri Supreme Court by filing an Application for Transfer with that court. App. 77-91. Welch asked the Missouri Supreme Court to decide whether the court of appeals erred in its application of the harmless error doctrine to defeat a parties' claimed right to arbitration under the FAA. App. 79, 86-88. On September 30, 2003, the Missouri Supreme Court denied transfer. App. 30.

## REASONS FOR GRANTING THE PETITION

### I. The Court of Appeals' Decision Directly Conflicts with Supreme Court Precedent and Creates a Split of Authority in the United States Courts of Appeals and State Courts of Last Resort.

The Court should hear this case because it concerns the ability of a party to properly enforce its federally-granted, statutory-based right to arbitrate in the courts of this country. It specifically raises the important federal question whether a court can apply a principle such as the harmless error doctrine to summarily deny a party its right to arbitrate under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* Although decisions of this Court recognize that state courts cannot apply state law to defeat the right to arbitration found in the FAA, here the Missouri Court of Appeals departed from this principle.

The court of appeals' decision to reject as harmless the claimed error in the denial of Welch's arbitration request therefore conflicts with this Court's precedent. In addition, the court of appeals' application of the harmless error doctrine departs from numerous opinions of United States courts of appeals and state courts of last resort. Unlike here, those courts enforce the right to arbitration found in the FAA without regard to harmless error analysis. The conflict created both with Supreme Court precedent and with the circuit and state courts should be corrected.

### A. The State Court Decision Below Infringes On An Important Federal Right to Arbitration In A Way That Directly Conflicts With This Court's Precedent.

The Missouri Court of Appeals determined that any error resulting from the denial of Welch's motion to compel arbitration was harmless under state law. This Court's decisions, however, hold that the FAA requires state courts, even in the face of contrary state law, to enforce arbitration agreements covered by the FAA. The court of appeals nevertheless decided to apply a state law principle – the harmless error doctrine – to summarily dismiss the federal statutory right found in the FAA.

As an initial matter, it is clear that the FAA applies to the arbitration agreement at issue. Section 2 of the FAA applies where there is a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995). The Court has interpreted the term "involving commerce" as used in the FAA to be the functional equivalent of the term of art "affecting commerce," which "ordinarily signal[s] the broadest permissible exercise of Congress' Commerce Clause

power." *Citizens Bank v. Alafabco, Inc.*, ___ U.S. ___, 123 S.Ct. 2037, 2040 (2003). The FAA therefore "encompasses a wider range of transactions than those actually . . . 'within the flow of interstate commerce.'" *Id.* (quoting *Allied-Bruce*, 513 U.S. at 273).

The court of appeals never addressed the issue of whether the FAA or the Missouri Arbitration Act, R.S. Mo. § 435.350 *et seq.* applies in this case. As Welch argued below, however, between the two the FAA applies. The attorneys involved in this dispute represented Lantz Welch, P.C. clients outside of Missouri, including Kansas. And the Court has recognized that engaging in interstate business satisfies the FAA's "involving commerce" test. *Citizens Bank*, ___ U.S. at ___, 123 S.Ct. at 2040. Missouri courts have similarly recognized as much in finding the FAA applicable to a dispute involving an accounting firm that served clients located in both Illinois and Missouri. *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182, 185 (Mo. App. 1999). The arbitration provision at issue is therefore enforceable pursuant to the FAA.

The "central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This Court has recognized that the FAA not only "declared a national policy favoring arbitration" but also "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting

parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

The Missouri Court of Appeals' decision defeats the purposes of the FAA. The court of appeals applied the harmless error doctrine to resolve Welch's claims in a judicial forum when the dispute should have been resolved by arbitration. It therefore exercised a power that the FAA has withdrawn.

Even if excluding Davis, Bethune and Jones from the arbitration was harmless error,[4] the court of appeals still could not apply that doctrine to defeat Welch's right under the FAA to arbitrate the dispute with the signatories to the arbitration agreement and the signatories' agents.[5] In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that § 2 of the FAA applies in state as well as federal courts. *Id.* at 12. " 'Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural

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[4] Such an assumption was incorrect to begin with. Welch was prejudiced for several reasons, including the fact that without Davis, Bethune and Jones as parties to the arbitration, Welch was prevented from fully explaining to the arbitration panel that it was Davis, Bethune and Jones, not Brake, who had withdrawn the cases from Lantz Welch, P.C. Additionally, had Davis, Bethune and Jones appeared as parties and not merely witnesses, their cross-examinations, and all other aspects of Welch's arbitration strategy would have taken a different tack.

[5] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996); *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. 1994).

policies to the contrary.'" *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone*, 460 U.S. at 24). The Court has held that the FAA displaces state law to the contrary. *Allied-Bruce*, 513 U.S. at 280 (citing *Southland Corp.*, 465 U.S. at 10-16; *Perry*, 482 U.S. at 489-92). State law is preempted "to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Applying these principles, the Court in *Perry* examined whether the FAA preempted a California statute that allowed actions for the collection of wages to be maintained regardless of whether an arbitration agreement existed. *Id.* at 484. The Court found that the clear federal policy of rigorously enforcing arbitration agreements placed § 2 of the FAA in conflict with the California statute. *Id.* at 490-91. Because the California statute provided a judicial forum for wage disputes to the exclusion of arbitration, the Court concluded that the statute must give way under the Supremacy Clause. *Id.* at 491.

A similar result was reached in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). *Casarotto* involved a Montana statute declaring arbitration clauses unenforceable unless an arbitration notice was prominently displayed on the contract. *Id.* at 683. The Court found that the state law conflicted with § 2 of the FAA because it conditioned the enforceability of arbitration agreements on the special notice requirement. *Id.* at 687. The Court therefore held that the Montana statute was preempted by federal law. *Id.* at 687-88.

The court of appeals' application of the harmless error doctrine, like the state statutes at issue in *Perry* and *Casarotto*, conflicts with § 2 of the FAA. Without even deciding whether arbitration would be required under the FAA, the court of appeals discarded Welch's right to arbitration. The harmless error doctrine was thus used to summarily defeat the right found in § 2 of the FAA.[6]

In sum, there is no basis to support the conclusion that the denial of the right to arbitration found in § 2 of the FAA could ever be harmless error, let alone a finding that such a result could be squared with federal law. The court of appeals' use of the harmless error doctrine directly conflicts with the Court's decisions establishing the pre-emptive effect of federal law in these circumstances. The Court should grant certiorari to correct this error.

### B. This Case Squarely Presents a Conflict in the Circuit Courts and State Courts of Last Resort Over the Applicability of Harmless Error Analysis to the FAA's Right to Arbitration.

The court of appeals' decision creates a conflict in the United States courts of appeals and state courts of last

[6] The fact that the present case involves a court decision, and not a statute as in *Perry* and *Casarotto*, makes no difference. The Court has recognized in this context that courts may not accomplish what the state legislature cannot. *See Casarotto*, 517 U.S. at 687 n.3; *Perry*, 482 U.S. at 492 n.9. A state legislature's ban on arbitration where its denial would result in only harmless error would surely be preempted under the holdings in *Perry* and *Casarotto*. There is no basis to reach a different result in this case simply because the actions of a court are involved.

resort. The conflict is over the ability of a court – regardless of federal preemption – to apply a principle like the harmless error doctrine to deny a statutory right like that found in the FAA. Counsel for Welch was unable to locate any United States court of appeals' decision or the decision of a state court of last resort applying the harmless error doctrine, as the court of appeals did here, to summarily deny a party the right to arbitration found in the FAA. In contrast, numerous decisions of both circuit courts and state courts of last resort enforce the FAA's right to arbitration without any indication that harmless error analysis even applies. *See Astra Oil Co., Inc. v. Rover Navigation, Ltd.*, 344 F.3d 276, 282 (2d Cir. 2003); *John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1098 (11th Cir. 2003); *Boomer v. AT&T Corp.*, 309 F.3d 404, 424 (7th Cir. 2002); *Personal Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 396 (5th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 639 (4th Cir. 2002); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 184 (3d Cir. 1999); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 (1st Cir. 1998); *Conseco Fin. Corp. – Alabama v. Boone*, 838 So.2d 370, 373 (Ala. 2002); *Skewes v. Shearson Lehman Bros.*, 829 P.2d 874, 882 (Kan. 1992); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 350 (N.Y. 1986); *Sentry Sys., Inc. v. Guy*, 654 P.2d 1008, 1009 (Nev. 1982). Contrary to the explicit recognition these courts give the statutory right to arbitrate under the FAA, the court of appeals shunned the FAA based on its misapplication of the harmless error doctrine.

The conflict over the application of the harmless error doctrine to the FAA's right to arbitration presents an issue

of great legal and practical importance. Through its application of the harmless error doctrine, the court of appeals was able to sidestep completely the question of whether arbitration was required under the FAA. If such a result is allowed to stand, courts across the country will be encouraged to simply avoid difficult issues of arbitrability altogether in favor of the simple expedient of finding "harmless error." The effect will be a substantial diminishment of the strong federal policy in favor of arbitration.

Without resolution of the conflict by this Court, the disagreement created by the court of appeals will likely proliferate. The Court should grant certiorari to remove the conflict and its effect on the important federal right to arbitration under the FAA.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 19, 2003

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[SEAL]

**In the**

**Missouri Court of Appeals**

**Western District**

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| LANTZ WELCH, and LANTZ WELCH, P.C.<br><br>Appellants,<br><br>v.<br><br>GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C., and DAVIS, BETHUNE AND JONES, L.L.C.,<br><br>Respondents. | WD 61089<br>(consolidated WD 61731)<br><br>Filed: June 10, 2003 |

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY**

**The Honorable Frank D. Connett, Jr., Judge**

**BEFORE Ronald R. Holliger, Presiding Judge, Paul M. Spinden, Judge, and James M. Smart, Judge**

**PER CURIAM**

This case involves consolidated appeals arising from a dispute over fees between Lantz Welch and his firm, Lantz Welch, P.C., and Tim Brake, Grant Davis, Scott Bethune, and Thomas Jones, attorneys who formerly practiced law in association with Welch's firm. The dispute centers on an agreement that Welch entered into with Brake on January 1, 1992. The agreement governed their association and said:

> In the event this Agreement is terminated by either party, any law business may be withdrawn by [Brake] with the understanding that [Brake] shall first reimburse [Welch] any amounts of monies previously advanced by [Welch] on said matters, and it is understood by [Welch] that [Welch] shall not participate in any legal fees in said matters unless the fee therefore has actually been collected and is deposited in the accounts of [Welch].
>
> . . . .
>
> Upon any dissolution of this Agreement, if there is any dispute concerning the matters covered by this Contract between the parties hereto, or their heirs or legatees, the matters shall be referred to a single arbitrator, if the parties or their representatives agree upon one; otherwise, to a board of three arbitrators, of which one shall be selected by each party or his representative to the difference and a third shall be selected by those two; and the decision and award of each single arbitrator or any two of such board, as the case may be, shall be final and binding upon said parties and their respective representatives.

Davis, Bethune, and Jones were not parties to this agreement or any similar agreement with Welch.

On December 5, 2000, Brake informed Welch that he was terminating the agreement and their association. In the letter, Brake said that he was withdrawing cases, which he identified in an attachment to the letter, and that he had agreed with Davis, Bethune, and Jones that they would end their association with Welch and form a new law practice in which Brake anticipated having an association.

A dispute erupted between Welch and the new firm, Davis, Bethune and Jones, L.L.C., concerning legal fees in the cases withdrawn by Brake. The dispute centered on a case in which Davis, Bethune, and Jones, L.L.C., had earned approximately $12 million in attorney fees. After Brake informed Welch that he was withdrawing the cases, Davis sent the clients letters seeking their transfer of their cases from Welch to Davis, Bethune and Jones. In a letter to Kimberly Alcorn, Davis said:

> Mr. Welch has announced that he is semi-retired from practicing law. I am writing to inform you that Lantz Welch will not be with our new law firm. I will be practicing with all the same lawyers except Lantz and the new firm name will be Davis, Bethune & Jones, LLC. I will continue to practice at the same location and my telephone and fax numbers remain the same. Mr. Welch can be reached at (816) 587-3773.
>
> I, along with Tom Jones and Tim Brake have handled your case. We would like to continue to represent you. You are not obligated to have me continue to represent you. You can retain another attorney if you wish, including Mr. Welch.
>
> If you want me to continue to represent you, please sign the enclosed letter indicating your desire. The amount of attorney fees you are obligated to pay will remain the same as the previous Contract of Employment of Attorneys.

Enclosed with this letter was a simple form for Kimberly Alcorn to sign. It said, "I would like for Tim Brake, Grant Davis, Scott Bethune and Tom Jones to represent me in my legal matter." Alcorn signed the form on January 26, 2001.

In April 2001, Welch sued, seeking an order to compel arbitration of the fee dispute among all parties, including Davis, Bethune, and Jones, and, in the alternative, for relief in *quantum meruit.* In response, Brake filed his own application to compel arbitration, but to exclude Davis, Bethune, and Jones as parties to the arbitration. The circuit court granted Brake's application. When the circuit court denied Welch's request that the circuit court reconsider its decision to exclude Davis, Bethune, and Jones as parties to the arbitration, Welch appealed.

On April 8 and 9, 2002, while Welch's appeal was pending, a panel of three arbitrators arbitrated Welch and Brake's dispute. On April 10, the panel issued its award for Brake. In a 2-1 decision, the panel found that Welch and his firm were not entitled to any of the law business withdrawn by Brake pursuant to the January 1, 1992, agreement and were not entitled to share in any of the legal fees paid in connection with that business.

On May 21, 2002, Brake, Davis, Bethune, and Jones filed in circuit court a motion for summary judgment on Welch's petition for relief in *quantum meruit.* The circuit court confirmed the arbitration award and granted summary judgment. Welch filed a second appeal.

The first appeal raises the issue of whether or not the circuit court erred in not compelling Davis, Bethune, and Jones to arbitrate the dispute that Welch and Brake had concerning their contract. Welch argues that the circuit court should have compelled Davis, Bethune, and Jones to arbitrate, even though they did not sign the contract,

because they either were Brake's agents or were third-party beneficiaries to the contract.[1]

Even if Welch is correct – and the record leaves much room for doubting that he is – we discern no prejudice to Welch resulting from Davis, Bethune, and Jones' not being compelled to arbitrate. Error without prejudice is not reversible error. *Neavill v. Klemp,* 427 S.W.2d 446, 448 (Mo. 1968). The only prejudice that Welch articulates is that to "completely understand the factual basis and merits of [Welch's and Brake's] dispute over legal fees, Davis, Bethune and Jones [were necessary] parties to the

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[1] In support of his contention, Welch relies on *Byrd v. Sprint Communications Company, L.P.,* 931 S.W.2d 810, 814-15 (Mo. App. 1996), in which this court declared, " 'Federal courts have extended the scope of arbitration clauses, signed by a principal party, to non-signatory agents.' [*Tractor-Trailer Supply Company v. NCR Corporation,* 873 S.W.2d 627, 630 (Mo. App. 1994) (citing *Pritzker v. Merrill Lynch Pierce Fenner and Smith, Inc.,* 7 F.3d 1110, 1122 (3d Cir. 1993)]. Our colleagues in the Eastern District appear to have adopted this rule as well [in *Tractor-Trailer*]. This court has adopted the rule in the context of allowing non-signatory agents to enforce an arbitration agreement where the agents were co-defendants with the principal who was a signatory to the arbitration agreement. *Madden v. Ellspermann,* 813 S.W.2d 51, 53 (Mo. App.1991). Because this court has permitted agents to take advantage of arbitration agreements which they were not a party to, consistency would dictate we hold non-signatory agents bound by arbitration agreements signed by their principals. We will adopt such a rule." We painted with too broad a brush in *Byrd.* The issue has nothing to do with consistency but with the application of proper principles of contract and agency law. Those principles will, under the proper circumstances, permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement. Assuming that they were agents – the record does not establish clearly that they were – we discern nothing about that status that would compel them to submit to arbitration.

arbitration of the dispute," and that he will be subject "to inconsistent results if this dispute is handled in different forums." He does not explain, however, why Davis, Bethune, and Jones' presence as witnesses at the arbitration proceeding was not sufficient to provide the factual basis. We do not accept the contention that compelling them to arbitrate was necessary to his establishing a full factual basis of his dispute with Brake. As for the inconsistent results, the results seem to have been consistent in this case, and, contrary to his concern, inconsistent results seems to be precisely what he desires: Having lost all to Brake, he is hoping to regain some of that loss from Davis, Bethune, and Jones. Even assuming that excluding Davis, Bethune, and Jones from the arbitration was error, it was harmless. Welch suffered no apparent prejudice.

In his second appeal, Welch challenges the circuit court's order to confirm the arbitration award. Our review of the circuit court's decision to confirm an arbitration award is governed by *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). We will affirm the circuit court's decision unless it is not supported by substantial evidence, or it is against the weight of the evidence, or it erroneously declares or applies the law. *Heineman v. Charno,* 877 S.W.2d 224, 227 (Mo. App. 1994); *Sheffield Assembly of God Church,* 870 S.W.2d 926, 929 (Mo. App. 1994).

Two different bodies of law could govern this dispute: the Uniform Arbitration Act, § 435.350 *et seq.,* and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The latter applies to contracts evidencing transactions involving or affecting interstate commerce. *Edward D. Jones and Company v. Schwartz,* 969 S.W.2d 788, 793 (Mo. App. 1998). The grounds for setting aside an arbitration award vary between these two bodies of law. The federal law

provides more bases for vacating an award. We need not resolve this issue, however, because we conclude that the premises on which Welch rests for setting aside the arbitrators' award are incorrect.

Welch contends that the arbitration award should have been set aside because it purported to enforce an attorney-fee sharing agreement that was contrary to public policy and unenforceable as a matter of law. Welch argues that the award violated two rules of professional conduct, Rules 4-1.5(e) and 4-5.6.[2]

The claim appears disingenuous. In his first appeal, Welch complains that the circuit court erred by not compelling Davis, Bethune, and Jones to arbitrate under the very agreement that he now claims is void. Nevertheless, we consider his point.

Welch argues that his agreement with Brake violated Rule 4-1.5(e) because its allocation of fees did not take into account the proportion of services performed by each lawyer. The rule, however, imposes qualifications on the right to divide a legal fee only when "lawyers who are not

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[2] Rule 4-1.5(e) says, "A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable." Rule 4-5.6 says, "A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

in the same firm" divide the fee. Rule 4-1.5(e). A "firm" is a "[b]usiness entity or enterprise." BLACK'S LAW DICTIONARY 634 (6th Ed. 1990). Brake associated himself with Welch in the practice of law at the law offices of Lantz Welch, P.C. Regardless of the nature of their business relationship – whether or not Brake was an independent contractor as Welch contends – they held themselves out to their clients and practiced together as a single, collective business entity. Welch's apparent belief that they were "not in the same firm" for purposes of the rule governing fee splitting is mistaken.

Welch also believes that his agreement with Brake violated Rule 4-5.6 because it restricted the right to practice following the termination of their relationship. Welch argues that the agreement can be read as granting Brake the power to withdraw law business and preventing Welch from representing a given client without regard for the client's desire. Although the contract is open to Welch's construction, the Supreme Court instructed long ago:

> If the contract can be performed without any violation of law, then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed. Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former construction should be adopted. But when the language imports illegality, the courts should not construe it in a different sense, for that would be to make a contract for the parties which they have not made themselves.

*State ex rel. Clayton v. Bland*, 256 S.W. 757, 758 (Mo. banc 1923) (quoting *Lamar Water and Electric Light Company v. City of Lamar*, 26 S.W. 1025, 1029 (Mo. 1894)).

Although Welch's and Brake's agreement granted Brake the power to withdraw "law business," Brake could do so only in compliance with the law and his ethical obligations. He was obligated to obtain the clients' consent to withdraw the cases, and this is what happened. Davis, on behalf of Davis, Bethune and Jones, L.L.C., sent letters to the clients involved and indicated that he, Jones, and Brake, had been handling their cases and would like to continue to represent them. The letter also informed the clients that they had the right to be represented by the lawyer of their choice, including Welch. The clients ultimately determined whether their cases would be withdrawn by Brake. We find nothing in the record suggesting that Brake or the arbitrators interpreted the contract in a manner that allowed Brake to prohibit Welch and his firm from representing a client that wanted them.

Welch also contends that the circuit court should not have confirmed the arbitration award because the arbitrators exceeded their power by considering an oral agreement that was outside the scope of arbitration. Welch argues:

> Despite having defined the arbitration [by asking only for a declaration of the provision concerning his authority to withdraw law business], and testifying under oath that he was not seeking enforcement of an oral agreement, Brake (along with Davis, Bethune and Jones, who all testified at the arbitration) proceeded to submit two days of testimony about an alleged oral "fill-the-pot" agreement. . . . Although Welch objected to the

> admission of such evidence, . . . the arbitration panel nevertheless allowed its admission and obviously took that evidence into consideration in rendering its award. The panel therefore considered matters beyond those submitted to it for decision.

Arbitrators' authority is limited to deciding matters that are in the scope of the arbitration agreement and have been submitted to them. If they decide matters beyond this scope, they have exceeded their authority. *Hayob v. Osborne,* 992 S.W.2d 265, 269 (Mo. App. 1999); *Schwartz,* 969 S.W.2d at 794.

The arbitrators arbitrated this dispute in accordance with Welch's and Brake's agreement, and they decided only matters within the scope of the issues submitted to them; that is, whether or not the agreement allowed Brake to withdraw the cases and collect the legal fees. That they may have considered evidence that should not have been admitted in deciding the submitted issue is of no consequence. This is an issue of legal error, and the courts will not consider claims of legal error in arbitration proceedings. *Schwartz,* 969 S.W.2d at 793-94. *See also Lorenzini v. Group Health Plan, Inc.,* 753 S.W.2d 106, 108 (Mo. App. 1988) ("An arbitrator's mistake of law . . . does not constitute an act in excess of the arbitrator's powers.").

In his remaining point on appeal, Welch challenges the circuit court's grant of summary judgment for Davis, Bethune, and Jones on his request for relief in *quantum meruit.* Our review is *de novo. ITT Commercial Finance Corporation v. Mid-America Marine Supply Corporation,* 854 S.W.2d 371, 376 (Mo. banc 1993). We review the record in the light most favorable to the party against whom the

judgment was entered and accord him the benefit of all reasonable inferences. *Id.*

The criteria on appeal for testing summary judgment are no different than those employed by the circuit court originally ruling on the motion. *Id.* We will uphold summary judgment only if the movant establishes that the parties are not contesting a genuine issue of material fact and that he is entitled to judgment as a matter of law. Rule 74.04(c)(3). Both criteria are requisite to summary judgment. "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *ITT,* 854 S.W.2d. at 380.

Davis, Bethune, and Jones argue that summary judgment was proper because Welch and his firm are not the real parties in interest to the *quantum meruit* action because they were not entitled to participate in any fees from the law business that Brake withdrew. They contend that Brake possessed, as a matter of contract, all rights that Welch may have had in the fees and that Brake is the only one who can enforce those rights. Davis, Bethune, and Jones assert that the arbitrators' decision confirmed this by declaring that Brake alone had a right to all legal fees.

We agree. Real parties in interest are persons who are directly interested in a lawsuit's subject matter and are entitled to maintain the action. *Janssen v. Guaranty Land Title Company,* 571 S.W.2d 702, 706 (Mo. App. 1978). Closely related is the doctrine of standing. *See Shannon v. Hines,* 21 S.W.3d 839, 841 (Mo. App. 1999). Standing requires that a party seeking relief have a legally cognizable interest in the subject matter of his suit and a threatened or actual injury. *Darrington v. George,* 982 S.W.2d

823, 825 (Mo. App. 1998). The interest at stake may be slight, attenuated, or remote. *Ste. Genevieve School District R-II v. Board of Aldermen of the City of Ste. Genevieve,* 66 S.W.3d 6, 10 (Mo. banc 2002).

In granting summary judgment, the circuit court issued findings of fact and conclusions of law stating that, because the arbitrators determined that the agreement transferred all of Welch's interest in the fees to Brake, Welch "has no legal interest" in them. The circuit court reasoned, "[T]hat these fees are now in the hands of defendants Davis, Bethune and Jones is of no lawful concern of [Welch]." We agree. The arbitrators' award determined that any right Welch may have had to the fees belonged to Brake. If Welch had no right to the fees, he no longer had a legally cognizable interest susceptible of protection via an action in *quantum meruit.* His interest in the subject matter is non-existent.[3]

Welch counters that he alone had a contractual relationship with the clients involved with the law business withdrawn by Brake, and that Davis, Bethune, and Jones – not Brake – took the cases from him, entered into their own contract, and collected the fees. The issue, however, of who was entitled to the attorneys fees under the agreement was presented to the arbitrators who

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[3] Welch argues in his reply brief that "Brake's non-receipt of the attorneys' fees at issue is the reason that the arbitration award in his favor, even if ultimately upheld, has no effect on Welch's status as a real party in interest to a *quantum meruit* claim against Davis, Bethune and Jones." We disagree. Even assuming that Brake did not claim the fees to which the arbitrators determined him entitled, we fail to see how that would resurrect Welch's interest in them. Welch has no cause to concern himself with what Brake does or does not do with his award.

determined – rightly or wrongly – that "[Lantz Welch and Lantz Welch, P.C., was] not entitled to participate in any legal fees paid[.]" Pursuant to that award, whatever rights Welch may have had in the fees were no longer his to claim. We will not look behind that award and question whether or not the arbitrators erred in their enforcement of the contract. Even were we to review the arbitration proceedings, we have already noted that we would not consider claims of legal or factual error as we would in reviewing the decision of a court of law. *See Schwartz,* 969 S.W.2d at 793-94.

We conclude that the circuit court did not commit reversible error in limiting the arbitration to Welch and Brake, in affirming the arbitration award, or in granting summary judgment. We affirm the circuit court's judgments. Davis, Bethune, and Jones' two motions to dismiss the first appeal are denied.

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IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

| | | |
|---|---|---|
| LANTZ WELCH, et al., | ) | |
| | ) | Case No. 01CV209224 |
| Plaintiffs, | ) | Division 8 |
| v. | ) | |
| | ) | |
| GRANT DAVIS, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER**

Based on the filings and evidence before the Court and for good cause shown, it is hereby ORDERED as follows.

1. Timothy L. Brake's And Timothy L. Brake, P.C.'s Application To Compel Arbitration with Lantz Welch and Lantz Welch, P.C. is hereby GRANTED.

2. Lantz Welch and Lantz Welch, P.C. are hereby ORDERED to forthwith begin the process of selecting a third arbitrator with Timothy L. Brake and Timothy L. Brake, P.C. and to proceed with the arbitration process and then the arbitration as agreed to by Lantz Welch, Lantz Welch, P.C., Timothy L. Brake, and Timothy L. Brake, P.C.

3. The Motion To Dismiss of Timothy L. Brake and Timothy L. Brake, P.C. is hereby GRANTED, and Count I of the Petition against Timothy L. Brake and Timothy L. Brake, P.C. is hereby DISMISSED with prejudice.

It is SO ORDERED.

/s/ Theodore B. Scott
Theodore B. Scott
Senior Circuit Judge

August 31, 2001
Date

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**

| | | |
|---|---|---|
| **LANTZ WELCH, AND LANTZ WELCH, P.C.** | ) | |
| | ) | **CASE NO. 01CV209224** |
| **Plaintiffs,** | ) | **DIVISION: SENIOR JUDGE** |
| **v.** | ) | |
| **GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.** | ) | |
| **Defendants.** | ) | |

**ORDER**

**NOW**, on this 28th day of December, 2001 the Court in chambers takes up Count I of plaintiffs' Petition to Compel Arbitration of the alleged dispute between plaintiff and defendants Grant Davis, Scott Bethune, Thomas Jones and Davis, Bethune and Jones, L.L.C. The Court heard oral arguments on December 7, 2001 and has considered the written suggestions of parties filed thereafter. The Court in accordance with written Conclusion of Law filed herein and made a part of this order finds the issue in favor of defendants Grant Davis, Scott Bethune, Thomas Jones and Davis, Bethune and Jones, L.L.C. and against plaintiffs Lantz Welch and Lantz Welch, P.C.

**WHEREFORE, IT IS ORDERED AND DECREED** that said defendants are not compelled to arbitrate the issues

raised in the petition. Any and all costs arising out of the adjudication of Count I are taxed against the plaintiffs.

/s/ Frank D. Connett, Jr.
**FRANK D CONNETT, JR**
**SENIOR JUDGE**

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**

| | | |
|---|---|---|
| **LANTZ WELCH, AND LANTZ WELCH, P.C.** | ) | |
| | ) | **CASE NO. 01CV209224** |
| **Plaintiffs,** | ) | **DIVISION: SENIOR JUDGE** |
| **v.** | ) | |
| **GRANT DIVIS** [sic], **SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.** | ) | |
| **Defendant.** | ) | |

**CONCLUSION OF LAW ON COUNT I**

However the relationship between defendants Davis, Jones and Bethune and plaintiff Welch at any given time may be characterized they are not bound by the provision of the partnership agreement between Welch and Brake which compels arbitration of any dispute between the two partners upon dissolution of the partnership. These defendants were not signatories to this agreement nor was this partnership agreement made for their benefit. Even if they in fact benefited by being associated with the partnership the agreement was not made for their benefit nor are they seeking to enforce any benefit thereunder; they are defendants, not plaintiffs. Neither were they agents of Welch and Brake for an issue arising out of the partnership agreement. If Welch had entered into a contract, containing an arbitration clause, to represent X in a legal matter and if any of these defendants had participated in that representation they might well be required to

arbitrate any *dispute with X* concerning such representation. But, that is not the case here. The issue here involves no third parties and is between Welch and these defendants who were not party to the partnership agreement where disputes between the partners were to be arbitrated.

/s/ Frank D. Connett, Jr.
**FRANK D CONNETT, JR**
**SENIOR JUDGE**

December 28, 2001

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

| | | |
|---|---|---|
| **LANTZ WELCH, AND LANTZ WELCH, P.C.** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | |
| **GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.** | ) | **Case No. 01-CV-209224** |
| **Defendants.** | ) | |

**ORDER**

Now on this 14th day of February, 2002, the Court takes up the motion to alter or amend its order of December 28, 2001 filed by Lantz, Welch and Lantz Welch, P.C.

The Court recognizes that there is a unity of interest between Welch on the one hand and Brake, Davis, Bethune and Jones on the other hand and that a joint arbitration of all parties would be the best method of resolving the disputes between these parties. However, Davis, Bethune and Jones can not be required to arbitrate their claims or any claim made against them since they are not parties to the 1992 agreement between Welch and Brake or in some way bound by it. The court still can find no evidence of any fact that would compel Davis, Bethune and Jones to be bound by the results in the Welch, Brake arbitration. By the same token the Court concludes that

Welch would not be bound by the results in the Welch, Brake arbitration as to any issues between Welch and Davis, Bethune and Jones. In fact Davis, Bethune and Jones could not join the Welch, Brake arbitration without the consent of Welch and Brake. Thus the motion to alter or amend it order of December 28, 2001 is denied.

/s/ Frank D. Connett, Jr.
**Frank D Connett, Jr.**
**Senior Judge**

A copy of the foregoing **ORDER** was served by facsimile transmission on this 14th day of February 200[illegible] to:

R. Lawrence Ward, Esq.
Richard E. McLeod, Esq.
Kirk T. May, Esq.

**Carol S. Buchanan**, Senior/Visiting Judges Law Clerk

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

| | |
|---|---|
| LANTZ WELCH, et al.,<br>Plaintiffs,<br>*v.*<br>DAVIS, BETHUNE & JONES, L.L.C., et al.,<br>Defendants. | Case No.: 01CV209224<br>The Hon. Frank D. Connett, Jr.<br>Division SJ |

**ORDER CONFIRMING ARBITRATION AWARD**

COMES NOW the Court upon defendants Timothy L. Brake and Timothy L. Brake, P.C.'s Application for Confirmation of Arbitration Award. Having reviewed defendants' Application and being fully advised in the premises, defendants' Application is **SUSTAINED**. The arbitration award of April 10, 2002 attached hereto and incorporated by reference as Exhibit A is confirmed and judgment is entered in accordance with its terms in favor of defendants Brake.

Dated: July 26, 2002

/s/ Frank D. Connett, Jr.
Judge Frank D. Connett, Jr.

Copies Mailed To:

Robert Lawrence Ward
Philip W. Bledsoe
Shughart, Thomson & Kilroy
120 West 12th Street
Kansas City, MO 64105

Kirk T. May
Phillip G. Greenfield
Rouse Hendricks German & May
1010 Walnut Street, Suite 400
Kansas City, MO 64106

Richard E. McLeod
Dean Nash
The McLeod Law Firm, P.C.
1100 Main Street, Suite 2900
Kansas City, MO 64105

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**Exhibit A**

**IN ARBITRATION BEFORE MARK KEMPTON, JOHN M. EDGAR AND MAX FOUST**

| | |
|---|---|
| TIMOTHY L. BRAKE and | ) |
| TIMOTHY L. BRAKE, P.C., | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) |
| | ) |
| LANTZ WELCH and | ) |
| LANTZ WELCH, P.C., | ) |
| Respondents. | ) |

## ARBITRATION AWARD

This matter came on for arbitration before the panel of arbitrators on April 8 and 9, 2002, in Kansas City, Missouri. The arbitration was conducted on the record and based on the evidence and exhibits presented by the parties, including the following:

1. The 1992 Agreement between Lantz Welch, P.C. and Timothy L. Brake, P.C., executed on behalf of those

professional corporations and by Lantz Welch individually and Timothy L. Brake individually.

2. Claimants' Statement of Claim.

3. Respondents' Answering Statement.

Having heard the testimony of the witnesses and reviewing the exhibits provided, the award of the panel is as follows if agreed to by two or more of them:

All of the law business listed in Exhibit 102 is governed by paragraph 9 of the January 1, 1992 Agreement and Respondents are not entitled to participate in any legal fees paid in any of the matters in the referenced law business.

Agree X Disagree ___ **Mark Kempton** /s/ Mark Kempton
Agree X Disagree ___ **John M. Edgar** /s/ John M. Edgar
Agree ___ Disagree X **Max Foust** /s/ Max W. Foust

Done this 10th day of April, 2002, at Kansas City, Missouri.

A copy of the foregoing ***ORDER CONFIRMING ARBITRATION AWARD*** was mailed this 3rd day of August 2002 to:

R. Lawrence Ward, Esq.
Philip W. Bledsoe, Esq.
Richard E. McLeod, Esq.

**Carol S. Buchanan**, Senior/Visiting Judges Law Clerk

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

| | |
|---|---|
| LANTZ WELCH, et al.,<br>Plaintiffs,<br>*v.*<br>DAVIS, BETHUNE & JONES, L.C.C., et al.,<br>Defendants. | Case No.: 01 CV **209224**<br>The Hon.<br>**Frank D. Connett, Jr.**<br>Division SJ |

**Judgment**

Now on July 26th, 2002, the Court, *sua sponte*, hereby reconsiders its prior oral ruling from the bench on July 22, 2002 denying the motion for summary judgment as to Count II filed on May 21, 2002 by defendants Davis, Bethume & Jones, LLC and Grant Davis, Scott Bethune, and Thomas Jones. The Court notes that the only other claim in this matter, Count I, has been disposed of by this Court's Order of December 28, 2001. That Order is now on appeal as Case No. WD 61089. This Judgment as to Count II thereby disposes of all remaining matters in this action.

Further, the Court has contemporaneously with this Judgment denied plaintiffs' application to vacate the arbitration award and granted defendants Timothy L. Brake and Timothy L. Brake, P.C.'s application to confirm the arbitration award.

The Court has again reviewed the papers filed by the parties with respect to the motion for summary judgment and the file in this matter, as well as oral argument presented on July 22, 2002, and reconsidered its prior ruling denying the motion for summary judgment.

Being fully advised in the premises, and after holding a telephone conference with counsel on July 26, 2002 to discuss the Court's reconsideration of its prior ruling, defendants' motion for summary judgment is hereby GRANTED, and it is accordingly,

ORDERED, ADJUDGED AND DECREED that the Court hereby reconsiders its prior oral ruling denying the motion for summary judgment and judgment on Count II is entered in favor of defendants Davis, Bethune and Jones LLC, Grant Davis, Scott Bethune and Thomas Jones. Costs are assessed against plaintiffs.

/s/ Frank D. Connett Jr.
**FRANK D. CONNETT JR.**
**Senior Judge**

A copy of the foregoing **JUDGMENT** was mailed this 3rd day of August 2002 to:

R. Lawrence Ward, Esq.
Philip W. Bledsoe, Esq.
Richard E. McLeod, Esq.

**Carol S. Buchanan**, Senior/Visiting Judges Law Clerk

**IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

| | | |
|---|---|---|
| **LANTZ WELCH, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | **Case No. 01-cv-209224** |
| **Vs** | ) | **Division: Senior Judge** |
| **GRANT DAVIS, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**FINDINGS OF FACTS CONCLUSIONS OF LAW**

Now on this 26th day of July, 2002 the Court sua sponte reconsiders it [sic] decision in this case rendered on July 22, 2002. After considering further argument, conducted by agreement via telephone conference, and reconsidering the written briefs and arguments of counsel for plaintiff and defendants on July 22nd the Court determines that it erred on July 22, 2002 and that the decision made on that day in this case must be set aside and for naught held.

The arbitrators have determined that paragraph 9 of the 1992 Welch-Brake agreement transfers all interest in fee from the referenced cases (exhibit 102 in the arbitrators award) to Timothy Brake. The plaintiff has shown on lawful basis for not confirming the award. The arbitrator's award made in this case on April 10, 2002 will be confirmed. Thus Lantz Welch, P.C. has no legal interest in fees from these referenced cases. The fact that these fees are now in the hands of defendants Davis, Bethume and Jones is of no lawful concern of plaintiff Lantz Welch, P.C.

Therefore defendant's motion for Summary Judgment on Count II will be granted.

/s/ Frank D. Connett, Jr.
**FRANK D CONNETT** 7/26/02
**SENIOR JUDGE**

**Missouri Court of Appeals**
**WESTERN DISTRICT**

**July 29, 2003**

**IMPORTANT NOTICE**

To: All Attorneys of Record

Re: LANTZ WELCH AND LANTZ WELCH, P.C., APPELLANTS

vs.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C., AND DAVIS, BETHUNE & JONES, L.L.C., RESPONDENTS
WD61089

Please be advised that Appellant's's [sic] motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

/s/ Terence G. Lord
Terence G. Lord
Clerk

cc: ROBERT WARD
RICHARD MCLEOD

816-374-0509
816-421-3339

**In the Supreme Court of Missouri**
SC85495
WD61089 consolidated with WD61731

September Session, 2003

Lantz Welch, and Lantz Welch, P.C.,

Appellants,

vs. (TRANSFER)

Grant Davis, et al.,

Respondents.

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

**STATE OF MISSOURI – Sct.**

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2003, and on the 30th day of September, 2003, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 30th day of September, 2003.

/s/ Thomas Simon Clerk

_____ D.C.

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

| | | |
|---|---|---|
| **LANZ WELCH, and LANTZ WELCH, P.C.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 01-CV-209224** |
| **v.** | ) | |
| **GRANT DAVIS, et al.,** | ) | |
| **Defendants.** | ) | |

**PLAINTIFFS' APPLICATION FOR ORDER COMPELLING ARBITRATION AND STAYING CIRCUIT COURT ACTION**

Plaintiffs, Lantz Welch and Lantz Welch, P.C., ("Welch") apply to this court for an Order under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and/or R.S.Mo. § 435.350, *et seq.*, compelling arbitration and staying all further proceedings in this action until arbitration has been completed in accordance with the terms of the agreement set forth below. As grounds for this application, Plaintiffs state as follows:

1. On April 20, 2001, Welch commenced this action by filing his Petition to Enforce Arbitration Or, Alternatively Declaratory Relief and Quantum Meruit.

2. On January 1, 1992, Welch and defendants Tim Brake and Tim Brake, P.C. entered into a written contract under which defendants Tim Brake and Tim Brake, P.C., agreed to associate themselves with Welch in the handling of certain legal matters.

3. The written contract between Welch and defendants Tim Brake and Tim Brake, P.C., contains the following arbitration clause:

> Upon any dissolution of this Agreement, if there is any dispute concerning the matters covered by this Contract between the parties hereto, or their heirs or legatees, the matters shall be referred to a single arbitrator, if the parties or their representatives agree upon one; otherwise, to a board of three arbitrators, of which one shall be selected by each party or his representative to the difference and a third shall be selected by those two; and the decision and award of each single arbitrator or any two of such board, as the case may be, shall be final and binding upon the parties and their respective representatives.

4. Defendants Grant Davis, Scott Bethune, and Thomas Jones, at all relevant times, acted as the agents of Tim Brake and Tim Brake P.C. (and also Welch) in connection with the written contract. By virtue of this principal-agent relationship, defendants Davis, Bethune and Jones are bound by the arbitration provision in the written contract.

5. A dispute has arisen between the parties under the terms of the written contract in that all defendants, through Brake, have improperly "withdrawn" law business (and associated legal fees) from Welch.

6. The written contract commits all issues involved in this action to arbitration.

7. Welch has presented to defendants a written demand to proceed to arbitration pursuant to the written contract but defendants refused, and continue to refuse, to

submit the entirety of this dispute over the legal fees to arbitration.

WHEREFORE, Plaintiffs Lantz Welch and Lantz Welch, P.C., request that the Court enter an Order: (1) compelling arbitration between the parties in accordance with the terms of the written contract; (2) staying all further proceedings in this action until arbitration has been completed under the terms of the written contract; and (3) awarding Plaintiffs their attorneys' fees, costs and expenses of this litigation and such other relief as the Court deems just and proper. DATED: May 9, 2001.

Respectfully submitted,

/s/ R. Lawrence Ward
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ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via facsimile and mailed, U.S. Mail, postage prepaid this 9th day of May, 2001 to:

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Attorneys for Defendants
Grant Davis, Scott Bethune, Thomas Jones and Davis Bethune & Jones, L.L.C.

/s/ R. Lawrence Ward
Attorney for Plaintiffs

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

| | | |
|---|---|---|
| **LANZ WELCH, and LANTZ WELCH, P.C.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 01-CV-209224** |
| **v.** | ) | |
| **GRANT DAVIS, et al.,** | ) | |
| **Defendants.** | ) | |

**SUGGESTIONS IN SUPPORT OF PLAINTIFFS' APPLICATION FOR ORDER COMPELLING ARBITRATION AND STAYING CIRCUIT COURT ACTION**

Pursuant to a written contract, Plaintiffs Lantz Welch and Lantz Welch, P.C. ("Welch") allowed defendants Tim Brake and Tim Brake, P.C. ("Brake") to associate with Welch's law practice. That written contract contains a binding arbitration provision. Defendants Grant Davis, Scott Bethune, and Thomas Jones also associated themselves with Welch's practice and, having acted as the agents of Brake, (and the agents of Welch as well) are themselves bound to the arbitration provision. The parties are now in an unfortunate dispute over the entitlement to legal fees under the written contract. The defendants refuse to submit the dispute to arbitration. As shown below, Welch is entitled to an Order of this Court enforcing his right to have this dispute resolved in arbitration.

## INTRODUCTION

For over forty (40) years, Welch maintained a very successful law practice in Kansas City, Missouri. (Petition at ¶ I.) Defendants Davis, Bethune, and Jones, as well as defendant Brake, were given the benefit of associating with Welch in the practice of law. (*Id.*) They enjoyed significant financial reward from the association. (*Id.*) In addition to consistent retention by clients and receiving referral business from other lawyers, all defendants benefitted from, among other things, Welch's financing of the operations of the law business and Welch's advancement of cash to fund contingency fee cases. (*Id.*)

To assist with his representation of clients, Welch engaged the assistance of the defendants in the practice of law. (Affidavit of Lantz Welch at ¶¶ 4, 5, attached as Exhibit A.) Davis, Bethune, and Jones performed legal work at the direction of Welch, as well as at the direction of Brake. (*Id.* at ¶ 6) This included, as they were authorized to do, signing clients to written fee contracts. (*Id.* at ¶¶ 10, 11.) And, although not separately contracting with Welch or Brake for compensation for their services, Davis, Bethune and Jones were handsomely rewarded for the work they performed at the direction of both Welch and Brake. (Petition at ¶¶ 20, 21; Affidavit of Lantz Welch at ¶¶ 7, 8.)

After demanding that Welch retire from the practice of law, the defendants have effectively ended their associations with Welch and exercised a take-over of the Lantz Welch law business. (Petition at ¶ 23; Affidavit of Lantz Welch at ¶¶ 14, 15.) Moreover, defendants have consistently denied both that Welch is entitled to legal fees arising from those cases subject to their association with

Welch and that this dispute over the fees is subject to arbitration. (Petition at ¶¶ 26, 30, 32, 33; Affidavit of Lantz Welch at ¶¶ 16, 17.)

## ARGUMENT

### I. Welch is Entitled to Have the Dispute Between the Parties Resolved in Arbitration

Missouri state courts have jurisdiction in matters involving both the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and the Missouri Arbitration Act, R.S.Mo §§ 435.350, *et seq. Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. banc 1985); R.S. Mo. § 435.430 Both the Federal and Missouri Acts "express the desire to enforce arbitration agreements as a matter of law to further the important public policy of resolving disputes without resort to the courts." *McCarney v. Nearing, Staats, Prelogar and Jones,* 866 S.W.2d 881, 887 (Mo. App. 1993) (citing *Village of Cairo v. Bodine Contracting Co.,* 685 S.W.2d 253, 258 (Mo.App. 1985)). "The public policy favoring arbitration is so strong that once an agreement to arbitrate is proven, the arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the asserted dispute." *Id.*

The Court's inquiry under both the Federal and Missouri Arbitration Acts is the same: "does a valid agreement to arbitrate exist, and if so, does the dispute fall within those terms?" *Village of Cairo v. Bodine Contracting Co.,* 685 S.W.2d 253, 260 (Mo. App. 1985). In conducting this inquiry, "the courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written

instrument which will support the claim." *Id.* (quoting *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960)). Thus, if the court concludes that the dispute is committed to arbitration by an agreement, the court must send the case to arbitration without reaching the merits of the underlying grievance. *Local 781 Int'l Ass'n of Firefighters v. City of Independence,* 996 S.W.2d 112, 115 (Mo.App. 1999).

### A. A valid agreement to arbitrate exists and all defendants are bound by that agreement

As to this Court's first inquiry, it is abundantly clear that a valid agreement to arbitrate exists. The written agreement signed by both Welch and Brake explicitly states that any dispute concerning the matters covered by the contract is subject to arbitration. The arbitration provision is contained in paragraph 14 of the written contract and states as follows:

> Upon any dissolution of this Agreement, if there is any dispute concerning the matters covered by this Contract between the parties hereto, or their heirs or legatees, the matters shall be referred to a single arbitrator, if the parties or their representatives agree upon one; otherwise, to a board of three arbitrators, of which one shall be selected by each party or his representative to the difference and a third shall be selected by those two; and the decision and award of each single arbitrator or any two of such board, as the case may be, shall be final and binding upon the parties and their respective representatives.

By signing the Agreement, defendant Brake explicitly agreed to submit disputes under the Agreement to arbitration. In addition, defendants Davis, Bethune, and Jones, through their actions and their relationships with Welch and Brake, have bound themselves to the Agreement's arbitration provision.

Under Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *Byrd v. Sprint Communications Co.,* 931 S.W.2d 810, 815 (Mo.App. 1996)[1]; *see also Tractor-Trailer Supply Co. v. NCR Corp.,* 873 S. W.2d 627, 630 (Mo. App. 1994). And, the arrangement under which Brake and Davis, Bethune, and Jones handled legal matters establishes an agency relationship between them. Agency is a fiduciary relationship which required the existence of three elements:

> (1) the agent 'holds a power to alter legal relation[s] between the principal and third persons and between the principal and himself'; (2) the agent 'is a fiduciary with respect to matters within the scope of his agency'; and (3) the principal has the right to control the conduct of the agent with respect to matters entrusted to him.'

---

[1] Although the court in *Byrd* ultimately did not bind the non-signatory in that case to the arbitration provision, this was based solely on the court's additional holding that the non-signatory party was not in an agency relationship with the signatory party. *Byrd,* 931 S.W.2d at 815. However, this latter finding by the court does not to [sic] detract from the court's establishment of the proposition of law that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. As shown below, because the facts of this case establish an agency relationship between Davis, Bethune, and Jones and Brake (and also Welch for that matter), this case clearly falls within the rule of law set forth in *Byrd* that a non-signatory agent is indeed bound.

*Capitol Indem. Corp. v. Citizens Nat'l Bank of Fort Scott,* 8 S.W.3d 893, 903 (Mo. App. 2000) (quoting *State ex rel. Bunting v. Koehr,* 865 S.W.2d 351, 353 (Mo. banc 1993).

The relationship between Brake and Davis, Bethune, and Jones establishes all three of these elements. As to the first element, Davis, Bethune, and Jones were authorized and/or held the power to sign clients to written fee contracts to which they were not parties. (Affidavit of Lantz Welch at ¶¶ 10-12.) Thus, Davis, Bethune and Jones held the power to effectively alter the legal relationship between Welch, Brake and third parties such as new clients. Additionally, by handling Brake's legal matters, Davis, Bethune, and Jones concomitantly held a power to alter the legal relationship between themselves and their principal.

The second and third elements of agency are also met. Davis, Bethune, and Jones owed a fiduciary duty to Brake (and Welch) to effectively handle legal matters entrusted to them. Moreover, this fiduciary duty would have prevented the three from interfering with the contractual relationship between their principal and the client. And it cannot seriously be disputed that to the extent Brake entrusted legal matters – which he was contractually bound to provide either to Welch and/or clients he independently contracted with – to Davis, Bethune, and Jones, it necessarily holds true that Brake held the right to control their conduct in handling those matters. Indeed, Brake used funds he obtained from his association with Welch to compensate Davis, Bethune, and Jones for the legal work entrusted to them. (Affidavit of Lantz Welch at ¶ 9.) It is logical then that in light of his contractual obligation to provide effective legal representation, and the payments to Davis, Bethune, and Jones, that Brake would

have the ability to control the method and manner in which the delegated legal work was performed.

Finally, as a practical matter, it makes logical sense to hold Brake and Davis, Bethune, and Jones to the agency relationship they operated under. Davis, Bethune, and Jones, were not, during the existence of Agreement between Welch and Brake, separately hired by clients. (Affidavit of Lantz Welch at ¶ 12.) Instead, David, Bethune, and Jones would, at most, enter Welch into contractual relationships with clients and then perform portions of the legal work as directed by Welch and Brake (*Id.* at ¶¶ 10-12.) Thus, Brake – and indeed Welch – expected as principals, that their agents Davis, Bethune, and Jones would faithfully handle the important legal matters they were directed to perform.

### B. The present dispute between the parties is plainly within the terms of the written Agreement

In order to compel arbitration, this Court must also find that the dispute between the parties is within the terms of the Agreement containing the arbitration provision. *See Village of Cairo,* 685 S.W.2d at 260. This requirement is easily met under the facts of this case. As set forth in Welch's Petition, the dispute between the parties is over the entitlement to legal fees. *(See, e.g.,* Petition at ¶¶ 26, 30.) The subject matter of the Agreement between Welch and Brake is identical to that involved in the dispute. The Agreement was designed to provide for the orderly allocation of those legal fees if the parties could not resolve the matter themselves. (*See, e.g.,* Agreement at ¶¶ 6, 8, 9, 10.) But because defendants are withholding

fees that rightfully belong to Welch, this dispute has arisen and the Agreement is thereby implicated.

Because a valid arbitration agreement – binding on all defendants – exists, and the dispute between the parties is within that agreement, both the Federal Arbitration Act and the Missouri Arbitration Act require that this Court order the defendants to submit the dispute to arbitration. Local 781, 996 S.W.2d at 115; 9 U.S.C. § 4; R.S.Mo. § 435.355. Further, because the dispute is subject to arbitration, this Court must stay this action upon compelling the parties to submit to arbitration. *State ex rel. PaineWebber, Inc. v. Voorhees,* 891 S.W.2d 126, 128 (Mo. banc 1995); *Mueller v. Hopkins & Howard, P.C.,* 5 S.W.3d 182,186 (Mo.App. 1999); 9 U.S.C. § 3; R.S.Mo. § 435.355.

## CONCLUSION

For the foregoing reasons, Welch respectfully requests that the Court enter an Order compelling arbitration between the parties, staying all further proceedings in this action until arbitration has been completed, and awarding Plaintiffs their attorneys' fees, costs and expenses of this litigation and such other relief as the Court deems just and proper.

DATED: May 9, 2001

Respectfully submitted,

/s/ R. Lawrence Ward
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ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via facsimile and mailed, U.S. Mail, postage prepaid this 9th day of May, 2001 to:

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Attorneys for Defendants
Grant Davis, Scott Bethune,
Thomas Jones and Davis,
Bethune & Jones, L.L.C.

/s/ R. Lawrence Ward
Attorney for Plaintiffs

EXHIBIT "A"

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

| | | |
|---|---|---|
| **LANZ WELCH, and LANTZ WELCH, P.C.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 01-CV-209224** |
| **v.** | ) | |
| **GRANT DAVIS, et al.,** | ) | |
| **Defendants.** | ) | |

## AFFIDAVIT OF LANTZ WELCH

I, Lantz Welch, being of lawful age and having first been duly sworn upon my oath, state as follows:

1. I am one of the Plaintiffs in the above-captioned matter, and have personal knowledge of the facts set forth in this Affidavit.

2. Pursuant to a written contract dated January 1, 1992, defendants Timothy L. Brake and Timothy L. Brake P.C., ("Brake") became associated with Lantz Welch, P.C. and me in the practice of law.

3. The written contract (referenced in paragraph 2 above) contains an arbitration provision that makes disputes arising from the written contract subject to mandatory arbitration.

4. I entered the written contract with Brake in order to engage his assistance in the representation of my clients.

5. I also engaged the assistance of defendants Grant Davis, Scott Bethune, and Thomas Jones to assist with the representation of my clients.

6. During the existence of the written contract between Brake and myself, Davis, Bethune, and Jones performed legal work at my direction, as well as at the direction of Brake.

7. To my knowledge, Davis, Bethune and Jones did not separately enter a written agreement with either Brake or myself for compensation for their services.

8. Although not separately contracting for compensation for their services, Davis, Bethune, and Jones received payment for the legal work they performed for Brake and me.

9. Brake used funds he obtained from his association with me to compensate Davis, Bethune, and Jones for the legal work entrusted to them.

10. In performing the legal work entrusted to them, Davis, Bethune, and Jones were authorized and/or held the power to sign clients to written fee contracts to which they were not parties.

11. The legal work performed by Davis, Bethune, and Jones included interviewing potential clients and, as they were authorized to do, signing on behalf of Lantz Welch, P.C. new clients to written fee contracts for me.

12. Davis, Bethune, and Jones were not separately hired by my clients. Instead, the clients hired Lantz Welch, P.C., and Davis, Bethune, and Jones then perform [sic] portions of the legal work as directed.

13. The overwhelming majority of clients who retained Lantz Welch, P.C., and signed written fee contracts with Lantz Welch, P.C., did so based on their knowledge of my legal background and not based on the reputations of Davis, Bethune, and Jones.

14. After demanding that I retire from the practice of law, the defendants have effectively ended their association with Lantz Welch, P.C., and me.

15. The defendants have effectively exercised a takeover of my law business.

16. The defendants have consistently denied that I am entitled to legal fees arising from those cases subject to the defendants' association with me and my law practice.

17. The defendants have also consistently denied that the entirety of this dispute over the legal fees is subject to arbitration.

FURTHER AFFIANT STATES NAUGHT.

/s/ Lantz Welch
Lantz Welch

STATE OF MISSOURI )
) ss
COUNTY OF JACKSON )

Subscribed and sworn to before me this 8th day of May, 2001.

/s/ Brenda L. Lee
Notary Public

My Commission Expires:

"NOTARY SEAL"
Brenda L. Lee, Notary Public
Clay County, State of Missouri
My Commission Expires 9/25/2002

**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| **LANTZ WELCH, et al.,** | ) | **Case No. WD 61089** |
| **Appellants,** | ) | **(Consolidated Case** |
| | ) | **No. WD 61731)** |
| **v.** | ) | |
| **GRANT DAVIS, et al.,** | ) | |
| | ) | |
| **Respondents.** | ) | |

**APPELLANTS LANTZ WELCH AND LANTZ WELCH, P.C.'S MOTION FOR REHEARING AND REHEARING EN BANC AND SUGGESTIONS IN SUPPORT**

(Filed Jun. 25, 2003)

Appellants Lantz Welch and Lantz Welch, P.C. (collectively, "Welch"), pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, respectfully move the Court to set aside its opinion issued June 10, 2003 and grant a rehearing and rehearing en banc, and as grounds for this motion, state:

1. The Court overlooked the fact that the harmless error doctrine cannot be applied to deprive Welch of his federally-granted statutory right under the Federal Arbitration Act to arbitrate (or his state-granted right under the Missouri Arbitration Act) both because that doctrine simply does not apply to the denial of such a statutory right and because federal law preempts conflicting state substantive and procedural law.

2. The Court overlooked or misinterpreted existing law in choosing not to follow previous decisions of the Missouri Court of Appeals for the Western District in *Byrd*

*v. Sprint Communications Co., L.P.,* 931 S.W.2d 810 (Mo. App. 1996) and the Missouri Court of Appeals for the Eastern District in *Tractor-Trailer Supply Co. v. NCR Corp.,* 873 S.W.2d 627 (Mo. App. 1994). This Court held that it "painted with too broad a brush in *Byrd.*" *See* Slip op. at 4 n.1. But under Supreme Court Operating Rule 22.01, and this Court's Local Rule XXXI, the Court's per curiam opinion must be reviewed by the Court en banc. In the alternative, this Court should simply act to correct its legal error in disregarding governing Missouri precedent.

3. The Court overlooked or misinterpreted, or incorrectly disregarded, the substantial evidence in the record of the agency relationship between Timothy L. Brake, P.C., Timothy L. Brake (collectively, "Brake") and Grant Davis, Scott Bethune and Thomas Jones. *See* Slip op. at 4 & 4 n.1.

4. The Court overlooked or misinterpreted Missouri precedent on the real-party-in-interest rule. *See* Slip op. at 8-10. Because Welch never assigned his right to participate in the attorneys' fees from the *Alcorn v. Union Pacific Railroad Co.* case, the real-party-in-interest rule has no application. In addition, the Court overlooked the fact that Brake never had a contractual relationship with the client in *Alcorn* (or any other case at issue), which makes the arbitration award in favor of Brake meaningless to the extent it would support application of the real-party-in-interest rule to this case.

## SUGGESTIONS IN SUPPORT

Under the Court's per curiam opinion, four lawyers who spent the majority of their legal careers working as salaried employees of a long-established law firm – over

thirty years old – can hold a secret meeting and hatch a plot to take over that firm with absolute impunity. Those lawyers can successfully arrogate to themselves the firm's clients and all its existing business, including all fees based on work already done subject to existing contractual relationships between the firm and its clients. Lantz Welch primarily produced the cases these lawyers took, and Lantz Welch paid all overhead expenses and advances on them. (L.F. 1-8, 11-13). Welch, not Brake, Davis, Bethune or Jones, provided the financing for the cases and assumed the entirety of the risk of their contingent-fee nature. (*Id.*) Not only did Welch finance the firm's operation, but he provided invaluable legal training for Davis, Bethune and Jones, the three young and inexperienced lawyers who worked on Lantz Welch, P.C. cases without any personal risk and for a guaranteed income. (*Id.*)

Contrary to the impression given by the Court's opinion, *see* slip op. at 2, this dispute is not centered on the *Alcorn* case, which spent almost its entire existence as a Lantz Welch, P.C. case and produced $12 million in attorneys' fees the Court now awards to respondents. The *Alcorn* case is only the tip of the iceberg; this dispute instead involves not just *Alcorn,* but 52 similarly-situated cases that will allow Brake, Davis, Bethune and Jones to appropriate millions upon millions of dollars in attorneys' fees without the slightest recognition to Welch. (Third S.L.F. (Case No. WD 61089) 199-203).

Not only does the Court's opinion allow this result, but it does so based on the legal and factual fiction that Timothy L. Brake somehow "withdrew" these cases. In reality, Davis, Bethune and Jones effectively "withdrew" the cases, and are using Brake and Brake's contract with Welch to do so without accounting for a cent. This dispute,

then, is really between Welch, on the one hand, and Davis, Bethune and Jones on the other. Unfortunately, that is the one dispute that will never be squarely faced if the Court's opinion is allowed to stand. An arbitration solely with Brake alone effectively solves nothing, because Brake never held a right to the attorneys' fees at issue. Welch might as well arbitrate with a phantom.

The Court overlooked or misinterpreted both the law and facts in Welch's first appeal, which challenged the trial court's failure to compel Davis, Bethune and Jones to arbitrate along with Welch and Brake. The Court overlooked the fact that the harmless error doctrine does not apply, and in any event cannot defeat a statutory right to arbitration. The Court also disregarded existing precedent that governed the issue – *Byrd v. Sprint Communications Co.*, 931 S.W.2d 810 (Mo. App. 1996) and *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. 1994) – and disregarded or overlooked the evidence in the record establishing that Davis, Bethune and Jones were either Brake's agents or third-party beneficiaries of the contract between Welch and Brake. In Welch's second appeal, the Court misinterpreted the real-party-in-interest rule when it concluded that Welch was not a real party in interest to his *quantum meruit* action against Davis, Bethune and Jones. The Court should, therefore, set aside its opinion and rehear this matter.

## I. The Court Overlooked the Fact that the Harmless Error Doctrine Has No Application in the Circumstances of this Case and, In Any Event, Cannot Be Used to Defeat Welch's Right to Arbitration Granted by Congress in the Federal Arbitration Act.

The Court found that, even assuming Welch was correct that he was entitled to arbitrate the dispute with not just Brake, but Davis, Bethune and Jones as well, it would not reverse because it could discern no prejudice to Welch. *See* Slip op. at 4. The Court stated that "[e]ven assuming that excluding Davis, Bethune and Jones from the arbitration was error, it was harmless." *Id.* at 5. The Court, however, erred in applying the harmless error doctrine to defeat Welch's federally-granted statutory right under the Federal Arbitration Act to arbitrate this dispute (and state-granted right under the Missouri Arbitration Act, for that matter), not just with the signatory to the arbitration agreement, but also with that signatory's agents.

Initially, Welch notes that the Court erred in finding that he suffered no prejudice as a result of Davis, Bethune and Jones not being compelled to arbitrate. *See* Slip op. at 4. Welch was prejudiced for several reasons. First, without Davis, Bethune and Jones as parties to the arbitration, Welch had no motive to fully explore how Brake never contracted with the clients at issue and, therefore, could not have withdrawn the cases. Davis, Bethune and Jones, rather than Brake, withdrew the cases and, as parties, Welch could have correctly shifted the focus of the arbitration to the dispute between Welch and Davis, Bethune and Jones. Welch, however, was prevented from fully showing

to the arbitration panel that Davis, Bethune and Jones, not Brake, withdrew the cases from Lantz Welch, P.C.

Second, Davis, Bethune and Jones appeared in the arbitration as witnesses for Brake, not as parties in their own right. They, therefore, had different motives when testifying at the arbitration proceeding. They could provide testimony favorable to Brake without fully risking their own interests given their non-party status. Third, Welch's counsel obviously had different motives in cross-examining Davis, Bethune and Jones since they were appearing merely as witnesses. Had they been appearing as parties, the cross-examinations, and all other aspects of Welch's arbitration strategy, could have been much more searching because they would have involved actual parties to the arbitration.

Even assuming, however, that excluding Davis, Bethune and Jones from the arbitration was harmless error, the court still could not apply that doctrine to defeat Welch's statutory right, whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Missouri Arbitration Act ("MAA"), R.S.Mo. § 435.350, *et seq.*, to arbitrate the dispute with the signatory to the arbitration agreement *and* the signatory's agents.[1] The harmless error doctrine has no application in such a situation. That doctrine, instead, applies to appellate review of the admissibility and reception of evidence and other trial-related

[1] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd*, 931 S.W.2d at 815; *Tractor-Trailer*, 873 S.W.2d at 630.

issues. *See State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. 2001) ("[f]urthermore, in matters involving the *admission of evidence,* we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." (emphasis added) (quoting *State v. Harrison,* 24 S.W.3d 215,218 (Mo. App. 2000)); *see also* 24 Daniel P. Card II & Alan E. Freed, *Missouri Practice – Appellate Practice* § 3.10 (2d ed. 2001); *State v. Wilson,* 816 S.W.2d 301, 303-04 (Mo. App. 1991) (recognizing that the infringement of certain rights "can never be treated as harmless error"). The case relied on by the Court to support its harmless error reasoning, *Neavill v. Klemp*, 427 S.W.2d 446, 448 (Mo. 1968), in fact involves an issue regarding the admission of evidence at trial and applies the harmless error doctrine in that context. *See id.* at 448. The court was unable to cite a single case that would support the application of the harmless error doctrine to defeat a statutorily-granted right, like the right to a full and fair arbitration granted to Welch under the FAA and the MAA.

Moreover, even if the harmless error doctrine could be said to apply in the circumstances of this case, it could in no event defeat Welch's federally-granted, statutory right to arbitrate this dispute with signatory Brake and his non-signatory agents Davis, Bethune and Jones.[2] Missouri courts, including the Missouri Supreme Court, have repeatedly made clear that: (1) they are prohibited from

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[2] The Court did not address the issue of whether the FAA or the MAA applies in this case. Welch, however, demonstrated in his briefing that between the two, the FAA is applicable. (*See* Appellant's Reply Br. (Case No. WD 61731) at 13-14).

applying substantive or procedural state law that is in derogation of federal law; and (2) the FAA preempts inconsistent state law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839-40 (Mo. 1985) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law.") (citation omitted); *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.*, 51 S.W.3d 916, 920 (Mo. App. 2001); *Group Health Plan, Inc. v. B.J.C. Health Sys., Inc.*, 30 S.W.3d 198, 202 n.2 (Mo. App. 2000); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 203 (Mo. App. 1996); *Mr. Mudd, Inc. v. Petra Tech, Inc.*, 892 S.W.2d 389, 391-92 (Mo. App. 1995); *Brookfield R-III Sch. Dist. v. Tognascioli Gross Jarvis Kautz Architects, Inc.*, 845 S.W.2d 103, 105 (Mo. App. 1993); *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 29 (Mo. App. 1992). Applying a harmless-error analysis to defeat Welch's federal right to arbitration was a direct violation of this principle. The Court was required to give effect to Welch's federal right to arbitration even if a denial of that right could possibly be said to be harmless in the circumstances of this case.

## II. The Court's Per Curiam Opinion Disregarded Existing Precedent and Must Be Reheard En Banc.

In its per curiam opinion, the Court candidly acknowledged that it was refusing to follow the previous decision of the Missouri Court of Appeals for the Western District in the *Byrd* case. The Court stated that it "painted with too broad a brush in *Byrd*." Slip op. at 4 n.1. The Court then assumed that Davis, Bethune and Jones were agents of Brake, but found there was "nothing about that

status that would compel them to submit to arbitration." *Id.*

*In Byrd,* this Court expressly adopted the "rule [that] non-signatory agents [are] bound by arbitration agreements signed by their principals." *Id.* at 815. In addition, the Missouri Court of Appeals for the Eastern District has previously held that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. 1994). The Court's per curiam opinion, however, disregards both of these holdings.

This Court's Local Rule XXXI, enacted to comply with Supreme Court Operating Rule 22.01, states that "[a]ny division opinion that chooses not to follow a previous decision of a Missouri appellate court shall be reviewed en banc." Local Rule XXXI. Under this local rule, and the Supreme Court Operating Rule on which it is based, Welch is entitled to a rehearing en banc. The holdings in *Byrd* and *Tractor-Trailer* were dispositive of the issue presented by Welch's first appeal. If the record established that Davis, Bethune and Jones were Brake's agents (which it does), the Court could only follow Missouri precedent by compelling Davis, Bethune and Jones to arbitrate with Welch and Brake. Even aside from a rehearing en banc, therefore, the Court should act to set aside its opinion to correct this error.

The Court's per curiam opinion should be reheard and set aside not only because it disregards existing precedent, but also because the law it creates is unworkable. Instead of following *Byrd,* the Court held that proper principles of contract and agency law "will, under the proper circumstances, permit a party to an arbitration agreement to

compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." Slip op. at 4 n.1. Under the Court's holding, parties will be left to guess whether a nonsignatory agent will be bound to an arbitration agreement signed by their principal. The new rule fashioned by the Court simply applies "under the proper circumstances." Slip op. at 4 n.1.

In addition, the Court's opinion not only fails to follow existing precedent, it also purports to overrule it. In place of the well-established and easily-applied rule created in both *Byrd* and *Tractor-Trailer,* the Court substitutes a test that has no real meaning for litigants. Welch is entitled to the benefit of the rule established in *Byrd* and *Tractor-Trailer,* and future cases should likewise be guided by that rule. Welch is entitled to a rehearing en banc to correct the per curiam opinion's failure to follow existing precedent in its misguided effort to craft new law in Missouri.

## III. The Court Overlooked, Misinterpreted or Disregarded the Record Evidence that Established, as a Matter of Law, that Davis, Bethune and Jones were Brake's Agents.

Rather than directly address whether Davis, Bethune and Jones were Brake's agents, the Court simply brushed this critical issue aside by holding that it discerned no prejudice to Welch even if Welch was correct and Davis, Bethune and Jones should have been required to arbitrate. Slip op. at 4. The Court did give the issue slight attention by stating that "the record does not establish clearly that [Davis, Bethune and Jones were Brake's agents]." Slip op. at 4 n.1. The record, however, contained evidence establishing as a matter of law that Davis, Bethune and Jones

were Brake's agents. Aside from this record evidence, the Court's *own opinion* establishes that agency relationship.

In failing to find that Davis, Bethune and Jones were Brake's agents, the Court overlooked or disregarded several pieces of critical record evidence. First, the Court overlooked or disregarded the various ways in which Davis, Bethune and Jones held the power to alter the legal relationship between Brake and third parties. *See* Appellant's Br. (Case No. WD 61089) at 17-18. The Court also ignored the other realities of the relationship between Brake and Davis, Bethune and Jones such as the fiduciary duty Davis, Bethune and Jones owed to Brake to effectively handle legal matters entrusted to them and Brake's right to control their conduct in handling those matters. *See* Appellant's Br. (Case No. WD 61089) at 19.

Even if Welch's own evidence did not establish an agency relationship between Brake and Davis, Bethune and Jones, the Court's own opinion does. In the course of its opinion, the Court found that Welch and Brake practiced together in a firm. *See* Slip op. at 6. The Court reasoned that Brake and Welch "held themselves out to their clients and practiced together as a single, collective business entity." *Id.* The Court also cited the definition of a "firm" in Black's Law Dictionary: "Business entity or enterprise." *Id.* (quoting Black's Law Dictionary 634 (6th ed. 1990)).

Under this reasoning, Davis, Bethune and Jones were also a part of that same firm. They, like Brake, associated themselves with Welch in the practice of law at the Law Offices of Lantz Welch, P.C. They also, along with Welch and Brake, held themselves out to their clients and practiced together as a single, collective business entity.

A key portion of the definition of "firm" in Black's Law Dictionary that the Court failed to recognize is that a firm is also defined as a "[p]artnership of two or more persons." Black's Law Dictionary 634 (6th ed. 1990). Under Missouri law, the partners in this partnership were all *agents* of each other. *Schnucks Markets, Inc. v. Cassilly,* 724 S.W.2d 664, 666 (Mo. App. 1987); *Baker v. McCue-Moyle Dev. Co.,* 695 S.W.2d 906, 911 (Mo. App. 1984). The Court's own opinion, therefore, establishes that the Court overlooked or disregarded the fact that Davis, Bethune and Jones were Brake's agents.

Because the Court overlooked or disregarded crucial evidence on the agency issue, and the opinion itself establishes that Davis, Bethune and Jones were Brake's agents, the opinion must be set aside. Welch's Motion for Rehearing should be granted on this basis as well.

## IV. The Court Overlooked or Misinterpreted the Real-Party-in-Interest Rule Under Missouri Law in Finding that Welch was not the Real Party in Interest to His *Quantum Meruit* Claim Against Davis, Bethune and Jones.

In Welch's second appeal, the Court found that the trial court correctly granted summary judgment in favor of Davis, Bethune and Jones on Welch's *quantum meruit* claim because Welch was not a real party in interest to that claim. Slip op. at 9-11. To reach this holding, however, the Court had to overlook or misinterpret the real-party-in-interest rule in Missouri.

Under Missouri law "[b]are legal title to a claim is sufficient to constitute a real party in interest who can bring an action thereon." *J.E. Dunn, Jr. & Assocs., Inc. v.*

*Total Frame Contractors, Inc.*, 787 S.W.2d 892, 896 (Mo. App. 1990). Welch met this test on his *quantum meruit* claim against Davis, Bethune and Jones. In finding otherwise, the Court overlooked the fact that the arbitration between Brake and Welch *did not* involve the *quantum meruit* claim or any issue between Welch and Davis, Bethune and Jones. Both legally and factually, therefore, the arbitration award in favor of Brake could not operate to divest Welch of his *quantum meruit* claim against Davis, Bethune and Jones.

The Court also overlooked the fact that Welch never assigned or waived his right to assert a *quantum meruit* claim against Davis, Bethune and Jones. Without such a finding, the real-party-in-interest rule had no application in the circumstances of this case. *See J.E. Dunn,* 787 S.W.2d at 896; *Janssen v. Guaranty Land Title Co.*, 571 S.W.2d 702, 706 (Mo. App. 1978). Although the arbitration award might establish that Welch assigned the right to assert a claim against Brake for the attorneys' fees at issue, that award simply does not touch on a claim against Davis, Bethune and Jones for those fees.

In addition, to the extent Court's real-party-in-interest ruling relies on a finding that Brake possessed any rights that Welch may have had to the attorneys' fees at issue, *see* Slip op. at 9, the opinion overlooks a fundamental fact. Brake never had a contract with the client at issue, Kimberly Alcorn, or any other client. It is, therefore, legally and factually impossible for Brake to possess the right to attorneys' fees from the *Alcorn* case when he has never had a contractual right to those fees. As Welch pointed out repeatedly in his briefing to the Court, in an argument that the Court must have overlooked to reach the opinion it did, Welch and Davis, Bethune and Jones are the only parties to this dispute who have had a

contractual right to the attorneys' fees at issue. *See* Appellant's Br. (Case No. WD 61089) at 28-29 n.12; Appellant's Br. (Case No. WD 61731) at 13-18; Appellant's Reply Br. (Case No. WD 61731) at 4-8. To say that *Brake* somehow extinguished *Welch's* right to the attorneys' fees at issue – the arbitration award notwithstanding – overlooks the factual realities of this case.

Welch's Motion for Rehearing should be granted for this separate reason as well. Even if Welch's Motion for Rehearing and Rehearing En Banc on the arbitration issue presented in the first appeal is denied, Welch is nevertheless entitled to a rehearing on the Court's decision to affirm the trial court's entry of summary judgment in favor of Davis, Bethune and Jones on Welch's *quantum meruit* claim.

## CONCLUSION

Welch's Motion for Rehearing and Rehearing En Banc should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent U.S. mail, postage prepaid, this 25th day of June, 2003 to:

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/s/ James M. Humphrey
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**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| **LANTZ WELCH, et al.,** | ) | |
| | ) | |
| **Appellants,** | ) | **Case No. WD 61089** |
| **v.** | ) | **(Consolidated Case** |
| | ) | **No. WD 61731)** |
| **GRANT DAVIS, et al.,** | ) | |
| | ) | |
| **Respondents.** | ) | |

**APPELLANTS LANTZ WELCH AND LANTZ WELCH, P.C.'S ALTERNATIVE APPLICATION FOR TRANSFER**

(Filed Jun. 25, 2003)

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Appellants Lantz Welch and Lantz Welch, P.C. (collectively, "Welch"), in the event Welch's Motion for Rehearing and Rehearing En Banc is denied, move the Court to order the transfer of this case to the Missouri Supreme Court because of the general interest and importance of the following questions:

1. Can a state appellate court disregard a parties' federally-granted, statutory right to arbitrate a dispute found in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (or even the state-granted right in the Missouri Arbitration Act, R.S.Mo. § 435.350 *et seq.*), by simply claiming that the denial of that right is "harmless error" under state law, especially since it is well-established in Missouri case law that state courts cannot apply substantive or procedural state law that is in derogation of federal arbitration law?

2. Under Missouri law, are non-signatory agents bound to arbitration agreements signed by their principals, as the Court of Appeals for both the Eastern and Western Districts have held in *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. E.D. 1994) and *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996), or are non-signatory agents bound only "under the proper circumstances[,]" as the court of appeals held in this case as it purported to limit the holdings in both *Tractor-Trailer* and *Byrd*?

3. Can only a lawyer who actually enters a contract for representation with a client be entitled to attorneys' fees for that representation, or can any lawyer claim that he or she has withdrawn the case and thereby gained all rights to attorneys' fees, including those fees attributable to work done before the withdrawal?

## STATEMENT OF FACTS

Welch appealed the trial court's order denying his application to compel Respondents Grant Davis, Scott Bethune, Thomas Jones, and the law firm of Davis, Bethune & Jones, L.L.C. – along with Respondents Timothy

L. Brake and Timothy L. Brake, P.C. (collectively "Brake") – to arbitrate this dispute over attorneys' fees. The trial court subsequently confirmed an arbitration award in favor of Brake in an arbitration he compelled between just him and Welch. The trial court also entered summary judgment on Welch's remaining *quantum meruit* claim against Davis, Bethune and Jones. Welch then appealed from the latter two decisions. On appeal, this Court affirmed the trial court's judgments. The Court found that any error in failing to compel Davis, Bethune and Jones to arbitrate was harmless. The Court also upheld the arbitration award in favor of Brake and the entry of summary judgment in favor of Davis, Bethune and Jones.

## SUGGESTIONS IN SUPPORT

Under the Court's per curiam opinion, four lawyers who spent the majority of their legal careers working as salaried employees of a long-established law firm can hold a secret meeting and hatch a plot to take over that firm with absolute impunity. Those lawyers can successfully arrogate to themselves the firm's clients and all its existing business, including all fees based on work already done under existing contingent fee relationships between the firm and its clients. Lantz Welch primarily produced the cases these lawyers took, and Lantz Welch paid all overhead expenses and advances on these cases. (L.F. 1-8, 11-13). Welch, not Brake, Davis, Bethune or Jones, provided the financing for the cases and assumed the entirety of the risk of their contingent-fee nature. (*Id.*) Not only did Welch finance the firm's operation, but he provided invaluable legal training for Davis, Bethune and Jones, the three young and inexperienced lawyers who worked on

Lantz Welch, P.C. cases without any personal risk and for a guaranteed income. (*Id.*)

Contrary to the impression given by the Court's opinion, *see* slip op. at 2, this dispute is not centered on the *Alcorn* case, which spent almost its entire existence as a Lantz Welch, P.C. case and produced $12 million in attorneys' fees the Court now awards to respondents. The *Alcorn* case is only the tip of the iceberg; this dispute instead involves not just *Alcorn,* but 52 similarly-situated cases that will allow Brake, Davis, Bethune and Jones to appropriate millions upon millions of dollars in attorneys' fees without the slightest recognition to Welch. (Third S.L.F. (Case No. WD 61089) 199-203).

Not only does the Court's opinion allow this result, but it does so based on the legal and factual fiction that Timothy L. Brake somehow "withdrew" these cases. In reality, Davis, Bethune and Jones effectively "withdrew" the cases, and are using Brake and Brake's contract with Welch to do so without accounting for a cent. This dispute, then, is really between Welch, or the one hand, and Davis, Bethune and Jones on the other. Unfortunately, that is the one dispute that will never be squarely faced if the Court's opinion is allowed to stand. An arbitration solely with Brake alone effectively solves nothing, because Brake never held a right to the attorneys' fees at issue. Welch might as well arbitrate with a phantom.

## I. Infringement of Federally-Granted, Statutory Right to Arbitrate Dispute and Preemption of Conflicting State Substantive and Procedural Law.

The Court found that, even assuming Welch was correct that he was entitled to arbitrate the dispute not just with Brake, but with Davis, Bethune and Jones as well, it would not reverse because it could discern no prejudice to Welch. *See* Slip op. at 4. The Court stated that "[e]ven assuming that excluding Davis, Bethune and Jones from the arbitration was error, it was harmless." *Id.* at 5. The Court, however, erred in applying the harmless error doctrine to defeat Welch's federally-granted statutory right under the Federal Arbitration Act (and state-granted right under the Missouri Arbitration Act, for that matter) to arbitrate this dispute not just with the signatory to the arbitration agreement, but also with that signatory's agents.

As an initial matter, the Court erred in finding that Welch suffered no prejudice as a result of Davis, Bethune and Jones not being compelled to arbitrate. *See* Slip op. at 4. Welch was prejudiced for several reasons. First, without Davis, Bethune and Jones as parties to the arbitration, Welch was prevented from fully explaining to the arbitration panel that it was Davis, Bethune and Jones, not Brake, who had withdrawn the cases from Lantz Welch, P.C. Second, Davis, Bethune and Jones appeared in the arbitration as witnesses for Brake, not as parties in their own right. They thus had different motives when testifying at the arbitration proceeding. They could provide testimony favorable to Brake without fully risking their own interests given their non-party status. Third, Welch's counsel obviously had different motives in cross-examining

Davis, Bethune and Jones since they were appearing merely as witnesses. Had they been appearing as parties, the cross-examinations, and all other aspects of Welch's arbitration strategy, could have been much more searching because they would have involved actual parties to the arbitration.

Even assuming, however, that excluding Davis, Bethune and Jones from the arbitration was harmless error, the court still could not apply that doctrine to defeat Welch's statutory right, whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Missouri Arbitration Act ("MAA"), R.S.Mo. § 435.350 *et seq.*, to arbitrate the dispute with the signatory to the arbitration agreement *and* the signatory's agents.[1] The harmless error doctrine has no application in such a situation. That doctrine instead typically applies to appellate review of the admissibility and reception of evidence and other trial-related issues. *See State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. 2001) ("[f]urthermore, in matters involving the *admission of evidence*, we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." (emphasis added) (quoting *State v. Harrison*, 24 S.W.3d 215, 218 (Mo. App. 2000)); *see also* 24 Daniel P. Card II & Alan E. Freed, *Missouri Practice – Appellate Practice* § 3.10 (2d ed. 2001); *State v. Wilson,* 816 S.W.2d 301, 303-04 (Mo. App. 1991)

[1] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd*, 931 S.W.2d at 815; *Tractor-Trailer*, 873 S.W.2d at 630.

(recognizing that the infringement of certain rights "can never be treated as harmless error"). The case relied on by the Court to support its harmless error reasoning, *Neavill v. Klemp,* 427 S.W.2d 446, 448 (Mo. 1968), in fact involves an issue regarding the admission of evidence at trial and applies the harmless error doctrine in that context. *See id.* at 448. The court was unable to cite a single case that would support the application of the harmless error doctrine to defeat a statutorily-granted right, like the right to a full and fair arbitration granted to Welch under the FAA and the MAA.[2]

Moreover, even if the harmless error doctrine could be said to apply in the circumstances of this case, it could in no event defeat Welch's federally-granted, statutory right to arbitrate this dispute with the signatory, Brake, and his non-signatory agents, Davis, Bethune and Jones. Missouri courts, including the Missouri Supreme Court, have repeatedly made clear that: (1) they are prohibited from applying substantive or procedural state law that is in derogation of federal law; and (2) the FAA preempts inconsistent state law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.,* 685 S.W.2d 837, 839-40 (Mo. 1985) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law.") (citation omitted); *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.,* 51 S.W.3d 916, 920 (Mo. App. 2001); *Group*

[2] The Court did not address the issue of whether the FAA or the MAA applies in this case. Welch, however, demonstrated in his briefing that between the two, the FAA is applicable. (*See* Appellant's Reply Br. (Case No. WD 61731) at 13-14).

*Health Plan, Inc. v. B.J.C. Health Sys., Inc.*, 30 S.W.3d 198, 202 n.2 (Mo. App. 2000); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 203 (Mo. App. 1996); *Mr. Mudd, Inc. v. Petra Tech, Inc.*, 892 S.W.2d 389, 391-92 (Mo. App. 1995); *Brookfield R-III Sch. Dist. v. Tognascioli Gross Jarvis Kautz Architects, Inc.*, 845 S.W.2d 103, 105 (Mo. App. 1993); *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 29 (Mo. App. 1992). Applying a harmless-error analysis to defeat Welch's federal right to arbitration was a direct violation of this principle. The Court was required to give effect to Welch's federal right to arbitration even if a denial of that right could possibly be said to be harmless in the circumstances of this case.

## II. Right to Compel Non-Signatory Agents to Arbitrate.

In *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. 1994), the Court of Appeals for the Eastern District held that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. *Id.* at 630. Two years later, the Court of Appeals for the Western District expressly adopted this rule. *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996). The Court's per curiam opinion, however, disregards both of these holdings.

In its per curiam opinion, the Court candidly acknowledged that it was refusing to follow the decision in the *Byrd* case. The Court stated that it "painted with too broad a brush in *Byrd*." Slip op. at 4 n.1. The Court also indicated that even if Davis, Bethune and Jones were agents of Brake, the rule established in *Byrd* would not apply to this case. *Id.* The Court, in direct conflict with

both *Byrd* and *Tractor-Trailer,* could "discern nothing about that [agency] status that would compel them to submit to arbitration." *Id.*

The holdings in *Byrd* and *Tractor-Trailer* were dispositive of the issue presented by Welch's first appeal. If the record established that Davis, Bethune and Jones were Brake's agents (which it does), the Court could only follow Missouri precedent by compelling Davis, Bethune and Jones to arbitrate with Welch and Brake. By disavowing this established principle of law in Missouri, the Court created a conflict in the case law that is of general interest and importance.

The Court should transfer its opinion to the Missouri Supreme Court not only because the opinion disregarded, and is inconsistent with, existing precedent, but also because the rule it creates is unworkable. Instead of following the clear rule of *Byrd* and *Tractor-Trailer,* the Court held that proper principles of contract and agency law "will, *under the proper circumstances,* permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." Slip op. at 4 n.1 (emphasis added). In the future, parties will be left to guess whether a non-signatory agent will be bound to an arbitration agreement signed by his or her principal. The new rule fashioned by the Court simply applies "under the proper circumstances" and provides no meaningful guidance. *Id.*

The Court's opinion not only fails to follow existing precedent, it also purports to overrule it. In place of the well-established and easily-applied rule created in *Byrd* and *Tractor-Trailer,* the Court substitutes a test that has no real meaning for litigants. Welch is entitled to the

benefit of the rule established in *Byrd* and *Tractor-Trailer* and future cases should likewise be guided by that rule.

The controversy created by the Court's opinion is one of general interest and importance because disputes concerning a party's obligation to arbitrate will increase along with the increased popularity of Alternative Dispute Resolution. Transfer should be granted to consider this important issue and remedy the conflicting case law the Court's opinion has created.

## III. Attorneys' Ability To Unilaterally Withdraw Client Matters And Extinguish Existing Rights To Attorneys' Fees Under Missouri Law.

Under the Court's opinion – including its interpretation of the arbitration award in favor of Brake and its application of the real-party-in-interest rule – an attorney who has never had a contract for fees with a client is now free to withdraw that client's case from a prior representation *and terminate all existing rights to attorneys' fees* created by the prior representation. This flies in the face of established precedent and fundamentally alters long-standing practices and relationships between Missouri attorneys.

By affirming the trial court's entry of summary judgment in favor of Davis, Bethune and Jones on Welch's *quantum meruit* claim, the Court effectively allowed an attorney who never had a contract with the client at issue to claim a right to the *entirety* of the attorneys' fees earned on the case. Under the Court's holding, the attorney can claim this right even though there are other attorneys who actually have a contractual relationship with the client

that governs attorneys' fees. If this ruling is allowed to stand, the relationship between attorneys in this state who wish to practice together will be fraught with uncertainty.

Brake never had a contract with the client at issue, Kimberly Alcorn, or any of the other 50 plus clients that have cases Brake claims to have "withdrawn." Yet despite this total lack of any contractual right, the Court found that Brake took from Welch any right that Welch had to attorneys' fees generated by the *Alcorn* case. Slip op. at 9. Such a finding, however, is legally and factually impossible because an essential predicate, a contractual right to those fees, is missing.

Welch, on the one hand, and Davis, Bethune and Jones on the other, are the only parties to this dispute who have had a contractual right to the attorneys' fees at issue. To say that Brake "extinguished" Welch's right to the attorneys' fees – the arbitration award in favor of Brake notwithstanding – is nonsensical. Without an underlying contractual right, Brake himself can never hold the right to the attorneys' fees. Instead, the issue of their ownership is between Welch on the one hand and Davis, Bethune and Jones on the other.

Under Missouri law, Welch's prior contingency-fee contract with Alcorn, and the services he rendered during his representation, entitle him to a claim for *quantum meruit*. *See Int'l Materials Corp. v. Sun Corp., Inc.*, 824 S.W.2d 890, 895 (Mo. 1992); *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 59-60 (Mo. 1982). And this claim properly lies against the attorneys who wrongfully hold the fees, *i.e.*, Davis, Bethune and Jones, not Brake.

By ruling as it did, the Court disregarded this fundamental rule of law governing both the relationship between attorneys and the proper recovery of attorneys' fees.

The issue is one of general interest and importance because the legal principles governing the relationships between attorneys, both during and after their association, must be clear, consistent, and logical. Transfer to the Missouri Supreme Court is warranted on this ground as well.

Respectfully submitted,

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**IN THE MISSOURI SUPREME COURT**

| | |
|---|---|
| **LANTZ WELCH, et al.,** | ) **No.** |
| **Plaintiffs/Appellants,** | ) |
| | ) **Circuit Court** |
| **v.** | ) **No. 01-CV-209224** |
| | ) **WD No. 61089** |
| **GRANT DAVIS, et al.,** | ) **(Consolidated WD** |
| **Defendants/Respondents.** | ) **No. 61731)** |

## APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___ or after opinion X

| | |
|---|---|
| The date the record on appeal was filed | April 24, 2002; October 3, 2002 |
| The date the Court of Appeals opinion was filed | June 10, 2003 |
| The date the motion for rehearing was filed and ruled on | June 25, 2003<br>July 29, 2003 |
| The date the application for transfer was filed in the Court of Appeals and ruled on | June 25, 2003<br>July 29, 2003 |

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.

| Party | Attorney |
| --- | --- |
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## APPLICATION FOR TRANSFER

Plaintiffs/Appellants Lantz Welch and Lantz Welch, P.C. (collectively, "Welch") respectfully move the Court for its Order transferring this case because of the general interest and importance of the following questions:

1. Under Missouri law, are non-signatory agents bound to arbitration agreements signed by their principals,

as the Court of Appeals for both the Western and Eastern Districts have held in *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810 (Mo. App. W.D. 1996) and *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. E.D.1994), or are non-signatory agents bound only "under the proper circumstances[,]" as the court of appeals held in this case as it purported to limit both *Byrd* and *Tractor-Trailer*?

2. May a state appellate court disregard a parties' federally-granted, statutory right to arbitrate a dispute found in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (or even the state-granted right in the Missouri Arbitration Act, R.S.Mo. § 435.350 *et seq.*), by simply claiming that the denial of that right is "harmless error" under state law, especially since it is well-established in Missouri case law that state courts cannot apply substantive or procedural state law that is in derogation of federal arbitration law?

3. May only lawyers who actually enter contracts for representation with clients be entitled to attorneys' fees for that representation, or may any other lawyer claim that they are "withdrawing" the cases and thereby gain all rights to attorneys' fees, including those fees attributable to work done before the "withdrawal?"

## STATEMENT OF FACTS

Plaintiff/Appellant Lantz Welch – whose accomplishments and contributions to the legal profession and community speak for themselves – has practiced law in Missouri for over 40 years. For many of those 40 years, Welch maintained his active trial practice through his professional corporation, Plaintiff/Appellant Lantz Welch,

P.C. Over the course of the 1980's and 1990's, Defendants/Respondents Timothy L. Brake ("Brake") and Grant Davis, Scott Bethune, and Thomas Jones (collectively "D, B & J") joined Lantz Welch, P.C. and were given the benefit of associating with Welch in the practice of law. Instead of producing their own business, all four lawyers worked on Lantz Welch, P.C. cases. And they did so while Welch: (1) financed the law practice in its entirety; and (2) advanced the funds for, and therefore assumed the entirety of the risk of, the firm's contingent-fee litigation practice.

In December of 2000, Welch was abruptly informed by letter that Brake and D, B & J were all leaving and that Welch's law firm was being taken from him. Brake, who wrote the letter, stated that he was taking all the Lantz Welch, P.C. cases with *him* based on the written contract[1] between Welch and Brake. Although Brake purports to have "withdrawn" all the cases, every single one of the former clients of Lantz Welch, P.C. are now clients of D, B & J through their limited liability company, Davis, Bethune & Jones, L.L.C. Brake has never had a contract with any of the clients at issue.

After commandeering Welch's entire law practice, the Defendants maintained that Welch would not be entitled to any part of the fees those 53 cases might generate. Even though Welch could obtain no meaningful relief from Brake, Welch sought to resolve the dispute with all of the

[1] The written contract also contains an arbitration clause, which makes any dispute under the contract subject to resolution through arbitration.

Defendants in an immediate arbitration. After being led to believe that all of the Defendants were going to take part in that arbitration, Welch was later told that D, B & J – the *real* parties to the dispute – expressly refused to be parties to the arbitration. Welch therefore filed this lawsuit to compel an arbitration with all of the Defendants.

Welch moved to compel Brake to arbitrate based on the arbitration clause in their contract. Welch sought to include D, B & J and their limited liability company based on their status as non-signatory agents or third-party beneficiaries under Missouri law. In response, Brake filed his own application seeking to compel an arbitration between just Brake and Welch. In August 2001, the trial judge at the time granted Brake's application to compel arbitration. A successor trial judge[2] entered a subsequent and separate order in December 2001 denying Welch's

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[2] This case was filed in the Circuit Court of Jackson County and originally assigned to a judge of that court. After the presiding judge entered a blanket recusal order – which he was prohibited from doing under this Court's precedent in *State of Missouri v. Nunley*, 923 S.W.2d 911, 917-18 (Mo. banc 1996) – the case was transferred to senior circuit judge Theodore B. Scott of Buffalo, Missouri. After Judge Scott granted Brake's application, Welch moved for a change of judge. Judge Scott refused to recuse himself until he was ultimately instructed to do so by the Western District. *See State ex rel. Welch v. Scott*, 58 S.W.3d 690 (Mo. App. 2001). The current trial judge, senior circuit judge Frank D. Connett, Jr., of St. Joseph, Missouri, was then appointed to the case and entered the erroneous order denying Welch's application to compel, although even he recognized that "there is a unity of interest between Welch on the one hand and Brake and D, B & J on the other hand and . . . a joint arbitration of all parties would be the best method of resolving the disputes between [the] parties."

application to compel and concluding that D, B & J and their L.L.C. were not required to arbitrate.

The trial court's arbitration rulings only led to a further denial of Welch's attempt to have his case heard. In the arbitration instituted by Brake, the arbitration panel ruled in favor of Brake, even though he was the only party who never held a contract with the clients at issue. D, B & J – seeking purely vicarious success – then moved for summary judgment on Welch's alternative *quantum meruit* claim against them.[3] The trial court granted that motion based on the apparent view that the arbitration award in favor of Brake extinguished the claim.

Welch appealed the trial court's order denying his application to compel an arbitration that included the real parties to this dispute, D, B & J. Welch also appealed the trial court's confirmation of the arbitration award in favor of Brake and the trial court's entry of summary judgment on Welch's remaining *quantum meruit* claim against D, B & J. On appeal, the Western District, in a per curiam opinion, affirmed the trial court. The Western District found that any error in failing to compel D, B & J to arbitrate was harmless. The Western District also upheld the arbitration award in favor of Brake and the entry of summary judgment in favor of D, B & J.

Welch, having been denied the opportunity to have the merits of his case heard, either through an arbitration

[3] D, B & J sought that vicarious success based on Brake's arbitration award despite Grant Davis' prior testimony in a hearing before the trial court that rejected the notion that the result in the arbitration would have a binding effect on them.

with all the parties, or under his alternative *quantum meruit* claim against D, B & J, now seeks relief from this Court.

## SUGGESTIONS IN SUPPORT OF APPLICATION

Under the Western District's per curiam opinion, four lawyers who spent the majority of their legal careers working as salaried employees of a long-established law firm can hold a secret meeting and hatch a plot to take over that firm with absolute impunity. Those lawyers can successfully appropriate to themselves the firm's clients and all its existing business, including all fees based on work already done under existing contingent-fee relationships between the firm and its clients. Lantz Welch primarily produced the cases these lawyers took, and Lantz Welch paid all overhead expenses and advances on these cases. Welch, not Brake or D, B & J, provided the financing for the cases and assumed the entirety of the risk of their contingent-fee nature. Not only did Welch finance the firm's operation, but he provided invaluable legal training to D, B & J, the three young and inexperienced lawyers who worked on Lantz Welch, P.C. cases without any personal risk and for a guaranteed income.

Contrary to the impression given by the Western District's opinion, this dispute is not centered on a single case. The Western District focused solely on the *Alcorn* case, which spent almost its entire existence as a Lantz Welch, P.C. case and produced the, $12 million in attorneys' fees that have been awarded to the Defendants. The *Alcorn* case, however, is only the tip of the iceberg; this dispute involves not just *Alcorn,* but 52 similarly-situated cases that may allow Brake and D, B & J to appropriate

millions upon millions of dollars in attorneys' fees without the slightest recognition to Welch.

Not only does the Western District's opinion allow this result, but it does so based on the legal and factual fiction that Brake somehow "withdrew" these cases. In reality, D, B & J effectively "withdrew" the cases, and are using Brake and Brake's contract with Welch to do so without accounting for a cent. This dispute, then, is really between Welch, on the one hand, and D, B & J on the other. Unfortunately, that is the one dispute that will never be squarely faced if the Western District's opinion is allowed to stand.

## I. Right to Compel Non-Signatory Agents to Arbitrate.

In *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. 1994), the Court of Appeals for the Eastern District held that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. *Id.* at 630. Two years later, the Court of Appeals for the Western District expressly adopted this rule. *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996). The Western District's per curiam opinion in this case, however, disregards both of these holdings.

In its per curiam opinion, the Western District candidly acknowledged that it was refusing to follow the decision in the *Byrd* case. The Western District stated that it "painted with too broad a brush in *Byrd*." Slip op. at 4 n.1. The Western District also indicated that even if D, B & J were agents of Brake, the rule established in *Byrd* would not apply to this case. *Id.* The Western District, in direct conflict with both *Byrd* and *Tractor-Trailer*, could

"discern nothing about that [agency] status that would compel them to submit to arbitration." *Id.*

The holdings in *Byrd* and *Tractor-Trailer* were dispositive of the issue presented by Welch's first appeal. If the record established that D, B & J were Brake's agents (which it does), the Western District could only follow Missouri precedent by compelling D, B & J to arbitrate with Welch and Brake. By disavowing this established principle of law in Missouri, the Western District created a conflict in the case law that is of general interest and importance.

The Court should order transfer of the Western District's opinion not only because the opinion disregarded, and is inconsistent with, existing precedent, but also because the rule it creates is unworkable. Instead of following the clear rule of *Byrd* and *Tractor-Trailer,* the Western District held that proper principles of contract and agency law "will, *under the proper circumstances,* permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." Slip op. at 4 n.1 (emphasis added). In the future, parties will be left to guess whether a nonsignatory agent will be bound to an arbitration agreement signed by his or her principal.

The Western District's opinion not only fails to follow existing precedent, it also purports to overrule it. In place of the well-established and easily-applied rule created in *Byrd* and *Tractor-Trailer,* the Western District substituted a test that has no real meaning for litigants.

The controversy created by the Western District's opinion is one of general interest and importance because disputes concerning a party's obligation to arbitrate will

increase along with the increased popularity of alternative dispute resolution. Transfer should be granted to consider this important issue and remedy the conflicting case law the Western District's opinion has created.

## II. Infringement of Federally-Granted, Statutory Right to Arbitrate Dispute and Preemption of Conflicting State Substantive and Procedural Law.

The Western District found that, even assuming Welch was correct that he was entitled to arbitrate the dispute not just with Brake, but with D, B & J as well, it would not reverse because it could discern no prejudice to Welch. *See* Slip op. at 4. The Western District stated that "[e]ven assuming that excluding D, B & J from the arbitration was error, it was harmless." *Id.* at 5. The Western District, however, erred in applying the harmless error doctrine to defeat Welch's federally-granted statutory right under the Federal Arbitration Act (and state-granted right under the Missouri Arbitration Act, for that matter)[4] to arbitrate this dispute not just with the signatory to the arbitration agreement, but also with that signatory's agents.

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[4] The Western District did not address the issue of whether the FAA or the MAA applies in this case. Between the two, the FAA is applicable. *See Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 793 (Mo. App. 1998); *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182 (Mo. App. 1999).

If one were to assume that excluding D, B & J from the arbitration was harmless error[5], the Western District still could not apply that doctrine to defeat Welch's statutory right, whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Missouri Arbitration Act ("MAA"), R.S.Mo. § 435.350 *et seq.*, to arbitrate the dispute with the signatory to the arbitration agreement *and* the signatory's agents.[6] The harmless error doctrine has no application in such a situation. That doctrine instead typically applies to appellate review of the admissibility and reception of evidence and other trial-related issues. *See State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. 2001) ("[f]urthermore, in matters involving the *admission of evidence,* we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." (emphasis added) (quoting *State v. Harrison*, 24 S.W.3d 215, 218 (Mo. App. 2000)); *see also* 24 Daniel P. Card II & Alan E. Freed,

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[5] Such an assumption is incorrect to begin with. Welch was prejudiced for several reasons, including the fact that without D, B & J as parties to the arbitration, Welch was prevented from fully explaining to the arbitration panel that it was D, B & J, not Brake, who had withdrawn the cases from Lantz Welch, P.C. Additionally, had D, B & J been appearing as parties, the cross-examinations, and all other aspects of Welch's arbitration strategy, would have taken a different tack because they would have been actual parties to the arbitration with a specific interest to protect. Having lost this essential element, the hearing was miscasted and directly prejudiced the founder of the firm, Lantz Welch.

[6] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd*, 931 S.W.2d at 815; *Tractor-Trailer*, 873 S.W.2d at 630.

*Missouri Practice – Appellate Practice* § 3.10 (2d ed. 2001); *State v. Wilson,* 816 S.W.2d 301, 303-04 (Mo. App. 1991) (recognizing that the infringement of certain rights "can never be treated as harmless error"). The case relied on by the Western District to support its harmless error reasoning, *Neavill v. Klemp*, 427 S.W.2d 446, 448 (Mo. 1968), in fact involved an issue regarding the admission of evidence at trial and applies the harmless error doctrine in that context. *See id,* at 448.

Moreover, even if the harmless error doctrine could be said to apply in the circumstances of this case, that doctrine could in no event defeat Welch's federally-granted, statutory right to arbitrate this dispute with the signatory, Brake, and his non-signatory agents, D, B & J. Missouri courts, including this Court, have repeatedly made clear that: (1) they are prohibited from applying substantive or procedural state law that is in derogation of federal law; and (2) the FAA preempts inconsistent state law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.,* 685 S.W.2d 837, 839-40 (Mo. 1985) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law.") (citation omitted); *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.,* 51 S.W.3d 916, 920 (Mo. App. 2001); *Group Health Plan, Inc. v. B.J.C. Health Sys., Inc.,* 30 S.W.3d 198, 202 n.2 (Mo. App. 2000). Applying a harmless-error analysis to defeat Welch's federal right to arbitration was a direct violation of this principle.

## III. Attorneys' Ability To Unilaterally Withdraw Client Matters And Extinguish Existing Rights To Attorneys' Fees Under Missouri Law.

Under the Western District's opinion – including its interpretation of the arbitration award in favor of Brake and its application of the real-party-in-interest rule in granting D, B & J' s motion for summary judgment – an attorney who has never had a contract for fees with a client is now free to withdraw that client's case from a prior representation *and terminate all existing rights to attorneys' fees* created by the prior representation. This flies in the face of established precedent, fundamentally alters long-standing practices and relationships between Missouri attorneys, and is patently unfair.

By affirming the trial court's entry of summary judgment in favor of D, B & J on Welch's *quantum meruit* claim, the Western District effectively allowed an attorney who never had a contract with the client at issue to claim a right to the *entirety* of the attorneys' fees earned on the case. Under the Western District's holding, the attorney can claim this right even though there are other attorneys who actually have a contractual relationship with the client that governs attorneys' fees. If this ruling is allowed to stand, the relationship between any and all attorneys in this state who wish to practice together will be fraught with uncertainty, and this new precedent will create a pathway for dispute and controversy.

Under Missouri law, Welch's prior contingency-fee contract with Alcorn, and the services he rendered during his representation, entitle him to a claim for *quantum meruit. See Int'l Materials Corp. v. Sun Corp., Inc.*, 824 S.W.2d 890, 895 (Mo. 1992); *Plaza Shoe Store, Inc. v.*

*Hermel, Inc.*, 636 S.W.2d 53, 59-60 (Mo. 1982). And this claim properly lies against the attorneys who wrongfully hold the fees, *i.e.*, D, B & J, not Brake. By ruling as it did, the Western District disregarded this fundamental rule of law governing both the relationship between attorneys and the proper recovery of attorneys' fees.

The issue is one of general interest and importance because the legal principles governing the relationships between attorneys, both during and after their association, must be clear, consistent, and logical. Transfer is warranted on this ground as well.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent U.S. mail, postage prepaid, this 11th day of August, 2003 to:

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